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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. TIMOTHY LEE WALKER et al., Defendants and Appellants.	A137905 (City & County of San Francisco Super. Ct. No. 213310)

This is an appeal from judgment after a jury convicted codefendants Timothy Lee Walker and Sammy Frazier (jointly referred to as defendants) of first degree murder, carjacking, and conspiracy to commit carjacking. Defendants, who have with few exceptions joined each other's arguments, challenge the judgment on many grounds, including: violation of the constitutional prohibition against illegal detention, search, and seizure (U.S. Const., 4th Amend.); insufficiency of the evidence supporting their convictions of felony murder, carjacking, and conspiracy to commit carjacking; multiple instructional errors; juror misconduct; and sentencing error. Defendants also raise issues in supplemental briefing with respect to certain postconviction changes in the law, including changes with respect to a trial court's discretion to strike or dismiss certain sentencing enhancements (Pen. Code, § 1385, as amended by Stats. 2018, ch. 1013, § 2, No. 9 West's Cal. Legis. Service, p. 6676); the newly afforded right of youthful offenders to develop a factual record for any future youth offender parole hearing (*People v. Franklin* (2016) 63 Cal.4th 261); and changes in the law governing the application of the natural and probable consequences theory of criminal liability and the felony-murder rule

(Pen. Code, § 1170.95, subd. (a)(3), as amended by Stats. 2018, ch. 1015, § 4, No. 9 West's Cal. Legis. Service, pp. 6679–6681).[1]

For reasons set forth below, we conclude substantial evidence does not support defendants' convictions on count II, carjacking, and count III, conspiracy to commit carjacking. At the same time, we conclude substantial evidence does support the jury's murder verdicts based on the prosecution's alternative theories of felony murder with robbery as the predicate crime and willful, deliberate and premeditated murder. We therefore vacate the judgment only as to counts II and III as to each defendant and remand to the trial court for a retrial limited to: (1) the allegations in the information relating to defendants' prior felony convictions; and (2) as to Walker, the development of a factual record for his potential future youth offender parole hearing. We affirm in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND

On September 28, 2010, a criminal information was filed charging defendants with murder (§ 187, subd. (a)) (count I); carjacking (§ 215, subd. (a)) (count II); conspiracy to commit carjacking (§ 182, subd. (a)(1)) (count III); and possession of a firearm by a felon (§ 12021, subd. (a)(1)) (counts IV and V). The information further alleged as to Walker that he had personally discharged a firearm (§ 12022.53, subd. (d)); had sustained one prior conviction and juvenile adjudication (§§ 667, subds. (d) & (e), 1170.12, subds. (b) & (c)); and had sustained one prior serious felony conviction (§ 667, subd. (a)(1)). It was further alleged as to Frazier that he was armed with a firearm (§ 12022, subd. (a)(1)); had sustained three prior convictions and juvenile adjudications (§§ 667, subds. (d) & (e), 1170.12, subds. (b) & (c)); and had sustained one prior serious felony conviction (§ 667, subd. (a)(1)). Finally, it was alleged each defendant had served a prior prison term (§ 667.5, subd. (b)).

[1] All statutory citations are to the Penal Code unless otherwise stated.

A jury trial began on April 12, 2012, at which the following evidence was presented.[2]

In the early morning hours of May 31, 2009, witness J.W. was leaving a San Francisco bar called Sam Jordan's on Third Street at Galvez Avenue when he heard "someone argue and then ended up seeing one guy shoot the other guy." Specifically, J.W. saw the victim (later identified as Winston Coleman) try to grab a gun from the shooter before being shot. J.W. then heard at least two more shots as the victim tried to run away. The shooter—dressed in jeans, a long-sleeve black shirt with a white shirt underneath, and a "[black] ski mask that was rolled up" like a beanie—escaped up Galvez.

San Francisco Police Officer Ryan Doherty was dispatched to the scene just before 2:00 a.m., after the city's gunshot detection system indicated gunfire at Third and Galvez at 1:55 a.m. He found a large crowd gathered around the victim, who was later determined to have died from a "penetrating gunshot wound." According to Officer Doherty, people in the crowd were screaming, "They took his Denali."[3]

Officers Dack Thompson and Marvin Cabuntala, driving in a marked police vehicle near Third and Galvez, heard dispatch advise that the suspect had left the murder scene in a white Dodge Charger. The officers decided to head toward a nearby freeway entrance in hopes of finding the vehicle before it left the city. In fact, when Officers Thompson and Cabuntala reached Industrial Street at Revere Avenue, about a mile from the murder scene and close to the freeway on-ramp, they saw a white Charger matching the suspect vehicle's description, with three occupants, come to a "hard stop." The officers, who saw no other vehicles in the area, activated the police vehicle's emergency

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[2] On October 11–12, 2011, a hearing was held on defendants' motion to suppress evidence seized by law enforcement following their detention and arrest shortly after the homicide. Defendants' suppression motion is discussed in detail below in connection with their Fourth Amendment challenge to the trial court's decision to deny the motion.

[3] The jury was instructed that it could consider Officer Doherty's statement not for its truth but only to explain why this information was later broadcast over the police dispatch system.

lights to pull the Charger over. After waiting for backup, the officers extracted the three occupants—Frazier (from the driver's seat), Walker (from the rear passenger seat), and Frazier's fiancée, Deshawna Morris (from the front passenger seat). After handcuffing the three occupants, police initiated a search of their persons and vehicle. At the time, Frazier was wearing a black "hoodie" with a white shirt underneath it.

The officers' search of the Charger's backseat revealed a pair of gloves, a knitted black mask, and a black "beanie" cap. A search of the front seat, in turn, revealed a right glove "wedged" under the driver's seat in a position that would have been difficult for the backseat passenger to reach. In the trunk, the police found a blanket and plastic container of the type "that you would slip a blanket in to keep it from getting wet, dirty, or damaged."

Officer John Dizon first visually searched Morris and noticed that "she kept pulling her left shoulder away from [him]" and appeared to have a "bulge" in the area between her breasts. After conducting a "blade hand" search, Officer Dizon determined she had a firearm in this area, at which point Morris spontaneously stated, "It's not mine. It's the person in the back seat [Walker]. He made me hold it." Further searching of Morris's person by a female officer revealed the firearm, a bag of bullets, and a bag appearing to contain marijuana.

Shortly after being searched, Morris asked to speak with Officer Thompson. Morris told him that she had been near Third and Galvez at the time of the murder. Specifically, Morris stated she and Frazier were in a bar and, after hearing gunshots, she fled up Third toward Palou Avenue. Moments later, Frazier arrived to pick her up in the white Charger, with Walker already in the backseat. Morris then entered the front passenger seat, and they drove off toward Industrial after Frazier stated, "We got a [*sic*] go see about a car first." Frazier then drove "to the area where the Denali was found . . . ." Once they arrived, Frazier left the Charger, walked to the Denali, and removed something from its trunk, which he carried back to the Charger.

Morris told Officer Thompson the Denali was parked under the freeway at Selby Street and Revere. A subsequent police search of this vehicle revealed the keys were still

in the ignition and shoe prints were left outside the open right passenger door. At trial, a criminalist with the San Francisco Police Department testified these prints were consistent with Frazier's right shoe.

At trial, Morris testified that she and Frazier (her "[fiancé]") had rented the white Dodge Charger on May 30, 2009, at the San Francisco airport.[4] The couple spent the previous night at a Motel 6 in Vallejo and intended to stay there again that night. After changing clothes in their motel room in anticipation of a night out in San Francisco, they drove to Oakland to visit a friend. While there, Frazier received a call on his cell phone from "TW," whom Morris understood to be Walker. Frazier walked away to take this call before returning to tell Morris they needed to go to San Francisco. Once there, Frazier drove to a corner store in the Bayview area, where Morris saw Walker and a woman, Dee, approach and enter their car. They drove to Galvez and parked the car, where defendants exited to speak privately on the sidewalk. Afterward, Frazier reentered the car, while Walker walked up Galvez toward Third.

Morris, still seated in the car, told Frazier that she wanted to leave, to which Frazier responded, "Well I'm going to call Tim and see what's taking so long." Afterward he told Morris, "Not too much longer." Shortly thereafter, they saw Walker cross the street: "Once he passed the crowd and got in the middle of the street, he pulled the mask down over his face." Seconds later, Morris heard gunshots and heard people screaming. Morris told Frazier something had happened and she wanted to leave, to which he responded that he was "waiting on Tim." Eventually, he started driving slowly down Galvez toward Phelps Street while "trying to use his phone at the same time." Turning off Phelps and driving toward the freeway overpass, Frazier made a call. About this time, Morris saw Walker walk out from between two cars. Frazier slowed the Dodge Charger so Walker could enter. Out of breath, Walker told them "he just bust somebody,

[4] Morris pleaded guilty to carjacking and purchasing bullets in exchange for testifying truthfully in this case.

he bust him," which Morris understood to mean he had shot someone. Walker insisted that Frazier drive, saying "he needed to go to the car, needed to go back to the car."

Walker directed Frazier to an area underneath the freeway overpass, where he pointed to a parked vehicle. After parking the Charger, defendants walked together to this vehicle for a brief period of time. Frazier walked back to the Charger first, with Walker following behind with what appeared to be "a comforter and a case" in his hands. When driving away from this area, however, they were stopped and detained by police. Morris, seated in the front passenger seat, felt something dig into her side as Walker was "telling me to take what he was handing to me." He then handed her various items, including a gun, which Walker slipped down her shirt.

Morris further testified that a few weeks before the murder, she heard defendants discussing the need to get a gun due to recent shootings in the area. Around this time, Morris recalled seeing a teenager approach defendants on the sidewalk, telling them "he had a gun." Defendants and the teenager got into a vehicle, leaving Morris on the street as they drove off. About 30–60 minutes later, defendants returned, and when Morris got back into the car, she noticed a gun.

Morris also recalled overhearing defendants "making phone calls looking for bullets." At some later date, Morris agreed to go to Big 5 Sporting Goods in Vallejo to buy Frazier bullets. Consistent with this testimony, a search of the Motel 6 in Vallejo where Morris and Frazier stayed the night before the murder revealed a partially full box of Remington Express .380-caliber live bullets in Morris's pink backpack.

Also testifying at trial was Sam Jordan, owner of Sam Jordan's and a good friend of the victim's. Jordan testified that the victim had been at his bar "all night" on May 30, 2009. At about 1:15 a.m. on May 31, Jordan walked the victim outside and saw him drive away in his burgundy Toyota, which was parked close to the bar on Galvez. However, later, after the victim was killed, Jordan did not see his Toyota and was unsure how he had returned after leaving the bar at 1:15 a.m. in the Toyota.

Mark Proia of the San Francisco Police Department crime lab testified that the gun found on Morris's person during her arrest was the one that had fired the bullet removed

from the victim during an autopsy. Two cartridges found at the murder scene were also fired from this gun and were of the same type as the bullets found on Morris's person and inside the box found in her backpack at the Vallejo motel room she had rented with Frazier.

Criminalist Tahnee Mehmet testified that DNA extracted from the left glove found in the Dodge Charger was a mixture of DNA from at least two people. Both Walker and Frazier were possible contributors to this DNA. On the right glove, Mehmet concluded Frazier was a possible contributor to the DNA mix. Further, with respect to the mix of DNA extracted from the outer mouth area of the face mask found in the Charger, Walker was a possible contributor but Frazier was not. With respect to the DNA mix extracted from the mask's inner mouth area, Mehmet again concluded Walker, but not Frazier, was a possible contributor.

On June 28, 2012, after seven days of deliberations, the jury returned the verdicts finding defendants guilty of murder, carjacking, and conspiracy to commit carjacking. In addition, the jury found Frazier guilty of unlawfully possessing a firearm while finding Walker not guilty of the same charge. Finally, the jury found true the allegations that, with respect to counts I, II, and III, Frazier was armed with a firearm while rejecting the allegation that Walker personally discharged a firearm causing death.

Shortly after these verdicts were returned and following a sidebar discussion with the prosecution, the trial court instructed the jury to return to deliberations for the purpose of determining whether the murder verdict was of the first or second degree. In doing so, the trial court clarified, at the jury's request, which instructions were relevant to this determination. Afterward, the jury returned the murder verdict of guilty with a handwritten addendum finding it to be first degree murder.

On December 20, 2012, after the trial court rejected their motions for new trial, defendants admitted having sustained prior felony convictions. In addition, the trial court denied Walker's motion to strike the allegation of a prior strike offense and granted Frazier's motion to strike the allegation of a prior prison term.

On January 31, 2013, the trial court sentenced Walker to a 50-years-to-life prison term and Frazier to a 75-years-to-life prison term, each with the possibility of parole. Their timely notices of appeal followed.

DISCUSSION

Defendants collectively raise numerous issues on appeal. First, defendants contend the trial court erred in denying their motion to suppress evidence which, they say, was obtained during a constitutionally infirm detention and arrest by law enforcement.

Second, defendants contend the jury's guilty verdicts on the carjacking counts lack the support of sufficient evidence because the prosecution failed to prove the victim's Yukon Denali was, one, "taken" and, two, taken from his "immediate presence," as the Penal Code requires. Further, due to the lack of sufficient evidence to prove carjacking, defendants contend their convictions for murder and conspiracy to commit carjacking must also be reversed because they are premised on the jury's erroneous carjacking finding.

Third, defendants raise several challenges to the trial court's jury instructions. Specifically, defendants contend the jury was misinstructed with respect to the elements of first degree and second degree murder (CALCRIM Nos. 520, 521), the requirement of juror unanimity (CALCRIM No. 548), liability for acts of coconspirators based upon the natural and probable consequences doctrine (CALCRIM No. 417), and derivative liability for murder (CALCRIM No. 403).[5]

Fourth, defendants contend their respective murder convictions must be reversed on the basis of two purported irregularities in the jury process. First, defendants contend the trial court acted beyond its jurisdiction when, after the jury returned a verdict for "murder," but before it was discharged, the court instructed the jury to return to deliberations in order to decide whether the murder was of the first or second degree. Next, they contend the trial court erred in denying their motions for new trial based upon

[5] Only Walker raises this derivative liability for murder argument.

declarations provided by a defense investigator and a juror establishing that another juror introduced into deliberations extra-record "expert" information that was relied upon by other jurors in reaching the verdicts.

Fifth, defendants challenge their sentences on the grounds that the trial court failed to fully advise them and obtain waivers of certain rights before accepting their admissions relating to the prior conviction allegations, and also failed to make necessary factual findings with respect to these allegations.

Sixth, in supplemental briefing filed on January 29, 2018, Walker raises an argument based upon recent changes in our criminal law that, because he was under age 25 when committing the charged crimes, he is entitled to a limited remand for a hearing to make a record of information relevant to his eventual youth offender parole hearing as contemplated by sections 3051 and 4801.

Lastly, in supplemental briefing filed on October 23, 2018 (Walker), and January 28, 2019 (Frazier), defendants seek: (1) reversal of their convictions and remand for resentencing based on amendments to sections 188 and 189 and the passage of section 1170.95, effective January 1, 2019, which collectively change the law governing the application of the natural and probable consequences theory of criminal liability and the felony-murder rule; and (2) remand of their cases in light of amendment of section 1385, also effective January 1, 2019, to enable the trial court to exercise its new discretion to strike or dismiss their sentencing enhancements for having prior serious felony convictions.

We address these issues as appropriate below.

I. The Constitutionality of Defendants' Detention and Arrest.

On appeal, defendants challenge the trial court's denial of their motion to suppress evidence (§ 1538.5) obtained by police following their detention and arrest on the night in question. Specifically, defendants contend their detention and arrest were unlawful and, thus, that the evidence seized incidental thereto was inadmissible because the police relied upon uncorroborated information from an anonymous tipster at the murder scene that the perpetrator(s) escaped in a white Dodge Charger—information too unreliable to

provide the officers reasonable suspicion to detain them. (See, e.g., *People v. Banks* (1993) 6 Cal.4th 926, 934 [" 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .' (U.S. Const., Amend. IV.) State and local law enforcement officials are subject to the requirements of the Fourth Amendment based upon the operation of the due process clause of the Fourteenth Amendment to the United States Constitution"].)

The applicable law is not in dispute. "[T]he temporary detention of a person for the purpose of investigating possible criminal activity may, because it is less intrusive than an arrest, be based on 'some objective manifestation' that criminal activity is afoot and that the person to be stopped is engaged in that activity. (*United States v. Cortez* (1981) 449 U.S. 411, 417 & fn. 2 . . . ; see also *In re Tony C.* (1978) 21 Cal.3d 888, 893 . . . [in which this court articulated a two-part test: (1) that some activity relating to crime has taken place, is occurring, or is about to occur; and (2) that the person to be detained is involved in that activity].)" (*People v. Souza* (1994) 9 Cal.4th 224, 230.) "A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*Id.* at p. 231.)[6]

On appeal of a denial of a motion to suppress evidence, we defer to the trial court's findings of fact so long as they are supported by substantial evidence. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.) As such, we cannot reweigh evidence, independently resolve conflicts in evidence, or make credibility assessments. Rather, we view the relevant facts in the light most favorable to the trial court's ruling, resolving all

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[6] Our high court has also made clear that "reasonable suspicion" to detain requires a lesser showing than "probable cause" to arrest. Not only can " 'reasonable suspicion . . . be established with information that is different in quantity or content than that required to establish probable cause, but also . . . reasonable suspicion can arise from information that is less reliable than that required to show probable cause.' " (*People v. Souza, supra,* 9 Cal.4th at pp. 230–231, quoting *Alabama v. White* (1990) 496 U.S. 325, 330.)

conflicts in its favor. (*People v. Jenkins* (2000) 22 Cal.4th 900, 969.) Further, we independently review only the trial court's application of the law to these facts. (*Ibid.*) If correct on any relevant theory, the trial court's ruling stands. (*Ibid.*)

Returning to the case at hand, defendants contend the totality of these circumstances precludes a finding of reasonable suspicion by law enforcement that, at the time their vehicle was stopped by police officers, they had committed any crime, with the result that their detention and arrest went afoul of the constitutional prohibition against unreasonable search and seizure of a person and deprived them of a fair trial. (See U.S. Const., 4th & 14th Amends.; Cal. Const., art. 1, § 13.) The factual record is not in dispute.

At the hearing on defendants' motion to suppress, Officer Macias testified that he and his partner arrived at the crime scene within 45 seconds of receiving notice that gunshots had been fired in the vicinity of Third and Galvez. Upon their arrival, the officers saw "a large crowd that was angry, crying, [and] chaotic" gathered near the victim's body. They asked the bystanders "what had happened or who had done this." Officer Macias was told by people in the crowd "that they left, they left." One woman, upset and crying, told Officer Macias in a face-to-face conversation, "They just shot him. They just left." Declining to identify herself, this woman also told Officer Macias "that the suspect that had shot the man left in a white Dodge Charger southbound on Phelps." At this point, a man in the crowd "grabbed her . . . and pulled her away from the scene," warning her, " '[D]on't talk to the police[.]' " Thus, based on what this unidentified woman had told him, at 2:00:06 a.m., Officer Macias broadcast to all responding police units a description of the suspect vehicle as a "[w]hite Dodge Charger . . . ."

Moments later, two responding officers, Thompson and his partner, Cabuntala, decided that, rather than proceed to the crime scene at Third and Galvez, they would "take an alternative route to begin to look for the suspect vehicle." Positing that the suspect(s) might try to escape by heading toward the freeway, the officers drove toward the freeway entrance at Industrial and Bayshore Boulevard, which Officer Thompson knew to be "a route away from Phelps and Galvez[.]" As the officers approached the

intersection near Selby, they saw a white Dodge Charger come to "a hard stop," which, Officer Thompson explained, was "a stop by which . . . the vehicle brake is depressed in such a manner that the car comes forward and back. It rocks forward and comes back to a stop, sometimes screeching." At the time, the Charger was the only vehicle the officers had encountered in the area. Further, according to Officer Thompson, before making the hard stop, the driver of the Charger appeared to have seen their patrol car.

At this point, Officer Thompson pulled in behind the Charger and brought it to a stop. The officers did not immediately approach the Charger. Rather, considering the stop to be "high risk" given the deadly nature of the involved crime, the officers first called for backup. As Officer Thompson explained, "the officer lays more consideration to the nature of what may happen as a result of the possible weapon that was used in the crime." Thus, upon receiving the call for backup at 2:09 a.m., Officer Dizon and his partner responded to Industrial and Barneveld Avenue, where they observed a Dodge Charger pulled over by their colleagues.

At the conclusion of this evidentiary hearing, the trial court denied defendants' motion to suppress, reasoning as follows:

"It appears to the Court from the totality of the circumstances, and the Court is first going to determine whether or not that there was a detention [that] was reasonable and that there was reasonable suspicion to specific articulable facts in this record to stop this particular car at this particular time. And the Court believes there was ample suspicion, reasonable suspicion to stop the car.

"The Court's already elaborated on all the facts that are set out in the record. Again, there is a shot spotter call to 911. The officers arrive shortly after in a high crime area. There is an individual who is laying [*sic*] on the ground, a crowd of people who are around who are hysterical, and there is at least one person from the crowd who comes out to speak with the officers and does [not] identify, refusing to give her name and is reluctant.

"She does specify that it was a white Dodge Charger. The direction of the vehicle, and in fact saying that the vehicle took a left turn on Phelps, so. And

moments later in the same area, and again by two officers, the testimony was there was not a lot of traffic at all, and this happened to be a white Dodge Charger, very close to the location of the shooting, close to a freeway ramp.

"The Court would note as well, which is an area where it could clearly be an escape route because once on the ramp, obviously it's harder for police to detect the vehicle. So the Court does find there was reasonable suspicion. The Court does not find, and I appreciate your clarifying, Ms. Solis, that this was an arrest."

On appeal of this decision, defendants rely on a decision from the United States Supreme Court, *Navarette v. California* (2014) 572 U.S. 393 (*Navarette*), which likewise involved an anonymous tipster. There, an unidentified woman called the Humboldt County 911 emergency dispatch system to report that she had been run off the road by a truck heading south on Highway 1 with license plate number "8–David–94925." (*Id*. at p. 395.) About 18 minutes later, a state highway patrol officer passed a truck matching the woman's description about 19 miles from "the reporting party off the roadway . . . ." (*Id*. at pp. 395, 399.) After initiating a stop of this truck, the officer discovered 30 pounds of marijuana in the truck bed. (*Id.* at p. 395.) The trial court thereafter denied the defendants' motion to suppress this evidence. (*Id*. at p. 396.)

Reviewing this matter, the United States Supreme Court held "the [traffic] stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated." (*Navarette, supra,* 572 U.S. at p. 395.) In so holding, the court concluded the anonymous call "bore adequate indicia of reliability for the officer to credit the caller's account" based upon the following facts: "the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving" in light of the detailed description of the truck she was able to provide to the 911 dispatcher; the highway patrol officer detained the truck, just 18 minutes later, only 19 miles from the caller's location; the caller's statement that she had just been run off the road qualified as an excited utterance for purposes of the hearsay rule; and, finally, the caller had utilized the 911 emergency system to report the crime, a well-known and reliable system for "identifying and tracing callers, and thus provid[ing] some

safeguards against making false reports with immunity." (*Id*. at pp. 398–400.) Finally, the court concluded the highway patrol officer had reasonable suspicion that criminal activity was afoot because the caller's report of having been run off the road constituted "a specific and dangerous result of the driver's conduct," which was "a significant indicator of drunk driving." (*Id*. at p. 403.) Thus, the high court ultimately decided that, although a " 'close case,' " the officer reasonably suspected the driver of the truck had run the caller's vehicle off the road and, thus, was justified in executing the traffic stop. (*Id*. at p. 404.)

Defendants attempt to distinguish *Navarette* from this case, arguing the anonymous 911 caller in that case "necessarily claimed eyewitness knowledge of [the] allegedly dangerous driving," whereas, here, with respect to the anonymous tipster, "there is no way to know whether anyone in the crowd—even the woman who provided more specific information to Macias—actually observed what they told police, as opposed to repeating what someone else said." We disagree.

As the United States Supreme Court explained, " 'an anonymous tip *alone* seldom demonstrates the informant's basis of knowledge or veracity.' [Citation.] That is because 'ordinary citizens generally do not provide extensive recitations of the basis of their everyday observations,' and an anonymous tipster's veracity is ' "by hypothesis largely unknown, and unknowable." ' [Citation.] But under appropriate circumstances, an anonymous tip can demonstrate 'sufficient indicia of reliability to provide reasonable suspicion to make [an] investigatory stop.' " (*Navarette*, *supra*, 572 U.S. at p. 397.) In this case, we conclude the circumstances of the anonymous tip received by Officer Macias demonstrated sufficient indicia of reliability to have provided Officers Cabuntala and Thompson with reasonable suspicion to thereafter stop the Dodge Charger for an investigation. Specifically, viewing the relevant facts in the light most favorable to the trial court's ruling and resolving all conflicts in its favor (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 969), we conclude as an initial matter that a reasonable inference can be made based upon the testimony of Officer Macias that the unnamed woman—present when Officer Macias and his partner arrived at the homicide scene about one minute after

gunfire was detected—was in fact describing what she had observed when she told him to his face that "the suspect that had shot the man left in a white Dodge Charger southbound on Phelps" and did in fact witness the events that she described. In addition, while defendants insist the unidentified woman's statements to Officer Macias are inadmissible hearsay, we agree with the People that her comments qualify as "excited utterances," given that she made them just after a deadly shooting as she and numerous other people were crowded around the victim, "angry, crying, [and] chaotic." As the high court recognized in *Navarette*, this circumstance enhances the reliability of the unidentified woman's statements. (*Navarette*, at pp. 399–400 ["In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because 'substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation.' [Citation.] A similar rationale applies to a 'statement relating to a startling event'—such as getting run off the road—'made while the declarant was under the stress of excitement that it caused.' Fed. Rule Evid. 803(2) . . . . See D. Binder, Hearsay Handbook § 8.1, pp. 257–259 (4th ed. 2013–2014) (citing cases admitting 911 calls as present sense impressions); *id.* § 9.1, at 274–275 (911 calls admitted as excited utterances)"].) Finally, like the unnamed 911 caller in *Navarette*, the unidentified woman in this case provided sufficiently detailed information about the suspect, his vehicle, and the vehicle's direction of travel to demonstrate the information's trustworthiness. The fact that others at the crime scene may have described the suspect fleeing in a different vehicle (a Yukon Denali) does not, in itself, undermine our conclusion that the unnamed woman's anonymous tip "bore adequate indicia of reliability," such that Officer Macias acted reasonably when crediting her information and broadcasting it to other officers. (See *Navarette*, at p. 398; *People v. Letner and Tobin*, *supra*, 50 Cal.4th at p. 145.)

Moreover, turning to Officer Cabuntala and his partner, Officer Thompson, the officers who stopped the Dodge Charger to investigate based upon Officer Macias's broadcast, we find additional circumstances lending credibility to the anonymous tipster's statements. In particular, the officers, who had strategically decided to head toward the

freeway exit near the murder scene in case the suspect sought to use it as an escape route, located the Dodge Charger about 10 minutes after Officer Macias broadcast the vehicle's description and only about a half-mile from the shooting. In addition, almost immediately upon seeing the Charger, which was, in fact, the only vehicle in the area, the officers saw the Charger's driver come to a "hard stop." This collection of facts supported a finding that the officers reasonably suspected criminal activity was afoot and that the occupants of the Charger were likely involved. (See *Navarette*, *supra*, 572 U.S. at p. 399 [where police "confirmed the [suspect] truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call)," the caller's contemporaneous report could be treated "as especially reliable"]; *People v. Souza*, *supra*, 9 Cal.4th at pp. 233, 235 [a suspect's flight is relevant when assessing whether reasonable suspicion exists, even if a possible innocent explanation for the flight may exist].)

Thus, for the reasons stated, we conclude the evidence in this case, considered in light of the totality of the circumstances, provided the police officers with "specific articulable facts" demonstrating "some objective manifestation" that defendants were involved in criminal activity, such that the officers' decision to initiate the investigative traffic stop did not run afoul of the constitutional prohibition against unreasonable search and seizure. (*People v. Souza*, *supra*, 9 Cal.4th at p. 231; see U.S. Const., 4th & 14th Amends.; Cal. Const., art. 1, § 13.) The trial court's ruling to deny defendants' motion to suppress evidence therefore stands.

II. Sufficiency of the Evidence to Prove Carjacking, Felony Murder, and Conspiracy to Commit Carjacking.

Defendants raise challenges to their convictions for carjacking, conspiracy to commit carjacking and first degree felony murder, each of which is based on the underlying premise that the prosecution failed to prove all of the elements of a carjacking offense. The relevant legal framework is not in dispute.

Carjacking is "the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence

of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear." (§ 215, subd. (a).)

Where, as here, a defendant challenges the sufficiency of the evidence supporting a finding of guilt, the reviewing court must examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence from which the jury could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 576–577.) Substantial evidence is defined as " ' "evidence which is reasonable, credible, and of solid value . . . ." ' " (*People v. Maury* (2003) 30 Cal.4th 342, 396.) In determining whether substantial evidence exists, we do not reweigh the evidence, resolve conflicts in the evidence or reevaluate the credibility of witnesses. (*People v. Jones* (1990) 51 Cal.3d 294, 314; see also *People v. Cortes* (1999) 71 Cal.App.4th 62, 71.) Rather, a reviewing court must accept logical inferences the jury might have drawn, whether from direct or circumstantial evidence. (*People v. Maury*, at p. 396.) " ' "A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.' " [Citations.]' [Citation.]" (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416–1417; see also *People v. White* (1969) 71 Cal.2d 80, 83 ["elements may be established by circumstantial evidence and any reasonable inferences drawn from such evidence"].) "Although it is the duty of the [trier of fact] to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the [trier of fact], not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment." ' " (*People v. Bean* (1988) 46 Cal.3d 919, 932–933.)

Here, viewing the record in a light most favorable to the judgment below, we find the following evidence relevant to whether defendants committed a carjacking. First, the victim's mother testified that she spent the whole day of May 30, 2009, with her son until he left in his Denali at about 10:00 p.m. Sam Jordan, in turn, testified that, after spending "all night" with the victim, he walked the victim to his other vehicle, a burgundy Toyota, at about 1:15 a.m. on May 31. Jordan was not aware of when or how the victim may have returned to the area; however, just before 2:00 a.m., J.W. saw the shooter arguing with the victim over something outside Sam Jordan's. At some point the victim struggled with the shooter over something that could have been the shooter's gun, before he was shot multiple times, including a fatal shot in the back as he tried to run away. Afterward, the shooter escaped up Galvez.

Deshawna Morris, Frazier's fiancée, testified that, on the night in question, she saw Walker cross the street past the crowd and then, once in the middle of the street, pull a ski mask down over his face. Seconds later, she heard gunfire and told Frazier that she wanted to leave. Frazier responded that he was "waiting on Tim." While the crowd at the murder scene was still dispersing, Frazier acquiesced to Morris's insistence that they leave. Frazier thus turned off Phelps and drove up Palou, "close to the freeway overpass," where Morris suddenly saw Walker walk out from between two cars. Frazier slowed the Dodge Charger so Walker could get in. Out of breath, Walker told them "he just bust somebody, he bust him," which Morris understood to mean he had shot someone. Walker insisted that Frazier drive, saying "he needed to go to the car, needed to go back to the car." Walker then directed Frazier to an area underneath the freeway overpass, where he pointed to the Denali, which, when searched later that morning by the police, still had the keys in the ignition.

According to defendants, the above-identified evidence is insufficient to prove a carjacking (or conspiracy to commit a carjacking) because the evidence fails to prove the requisite statutory elements that the victim's Denali was, one, "taken" and, two, taken by Walker from the victim's "immediate presence."

Addressing defendants' argument, it is important to note section 215 "does not require that the victim be inside or touching the vehicle at the time of the taking." (*People v. Medina* (1995) 39 Cal.App.4th 643, 650.) Rather, the requirement that the defendant "took the car from the victim's 'person or immediate presence[]' (§ 215, subd. (a)[]) . . . is similar to the equivalent requirement for robbery. Due to differences in the statutory elements, the analogy between carjacking and robbery is imperfect. [Citation.] However, the 'Legislature modeled the carjacking statute on the robbery statute,' and some of the language in the carjacking statute (§ 215) tracks that of the robbery statute (§ 211). [Citation.] Specifically, both section 211 and section 215 require a taking from the 'person or immediate presence' of the person. [Citations.] [¶] . . . [S]omething is in a person's 'immediate presence' if it is ' " 'so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it.' " ' [Citation.] 'Under this definition, property may be found to be in the victim's immediate presence "even though it is located in another room of the house, or in another building on [the] premises." ' [Citation.] Or, as the Court of Appeal recently said, 'A vehicle is within a person's immediate presence for purposes of carjacking if it is sufficiently within his control so that he could retain possession of it if not prevented by force or fear.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 989.)

Having considered these principles, we conclude the evidence does not support a reasonable inference by the jury that the Denali was in the victim's " 'immediate presence' " or " ' " 'so within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, [have] retain[ed] his possession of it.' " ' " (*People v. Johnson*, *supra*, 60 Cal.4th at p. 989.) In doing so, we accept the inferences arising from circumstantial evidence that the victim at some point returned to Sam Jordan's in his Denali, that he subsequently engaged in a struggle with the shooter over something (perhaps keys or a gun), and that the shooter maintained possession of this item by use of a deadly weapon (his gun). However, we are still left without any evidentiary basis for finding that Walker took *the Denali* from the victim's immediate

presence by use of such force. On the contrary, there is no evidence placing the Denali at or near the victim at the time he was shot, much less placing Walker at or near it immediately afterward. The prosecution, defending the jury's carjacking verdict, points to the evidence that several minutes later after escaping up Galvez,[7] Walker was picked up in the Dodge Charger about a mile away on Palou by Frazier, telling him he needed to "go back to the car" (meaning the Denali, parked near the overpass). However, given the gap of time between the victim's shooting and Walker's presence at the Denali, as well as the lack of evidence that Walker was in fact the person who took the Denali from the victim and drove it to the overpass, the prosecutor's theory fails to establish that a carjacking occurred. (Cf. *People v. Hoard* (2002) 103 Cal.App.4th 599, 609 [the elements of carjacking were established where: "Defendant took possession of [the victim's] car by threatening her and demanding her car keys. Although she was not physically present in the parking lot when he drove the car away, she had been forced to relinquish her car keys. Otherwise, she could have kept possession and control of the keys and her car"]; *People v. Medina* (1995) 39 Cal.App.4th 643, 646–647, 651 [the evidence sufficed to show the vehicle was taken from the victim's "immediate presence," even though the victim was in a motel room and his car was parked outside about 20 feet away, where, after luring the victim into the motel room in order to take his car, the defendant and his brother took the victim's car keys and other possessions by force and then left in his car].)

Accordingly, the jury's murder verdict cannot be affirmed based on a felony-murder theory with carjacking as the predicate offense. Nor can counts II and III, carjacking and conspiracy to commit carjacking, stand. Given the lack of substantial evidence that Walker took the vehicle from the victim's immediate presence by use of force or fear, we further conclude on this record the evidence fails to prove Walker or

[7] J.W. gave conflicting testimony regarding the shooter's escape route, testifying, first, that he ran off along Third and, thereafter, that he ran up Galvez. We resolve this conflict, as we must, in favor of the judgment. (*People v. Tripp* (2007) 151 Cal.App.4th 951, 955.)

Frazier and one or more other members of the conspiracy committed a carjacking, agreed to commit a carjacking or harbored an intent to commit a carjacking. (See *People v. Vu* (2006) 143 Cal.App.4th 1009, 1024–1025 [conviction for conspiracy requires, inter alia, proof of an agreement between two or more people who have the specific intent to agree or conspire to commit an offense and the specific intent to commit that offense, citing §§ 182, subd. (b), 184].) Accordingly, we reverse defendants' convictions as to counts II and III and order that the sentences imposed as to each defendant on these counts be set aside. (See *People v. Morris* (1988) 46 Cal.3d 1, 22 [where the evidence was insufficient as a matter of law to support the special circumstance finding of robbery-murder, "[t]hat finding, and the penalty judgment based thereon, must . . . be set aside, and further proceedings on this allegation are barred by the double jeopardy clause"].)

At the same time, however, our conclusions with respect to carjacking do not automatically dispose of defendants' argument that the prosecution failed to prove first degree murder. At trial, the prosecution relied upon two primary theories to prove first degree murder—that Walker shot and killed the victim in the course of committing a felony offense of carjacking, robbery, *or* attempted robbery, and that he shot and killed the victim in a deliberate, premeditated fashion. Thus, notwithstanding the failure of the prosecution's felony-carjacking murder theory, we still must determine whether the jury's guilty verdict could independently stand on substantial evidence in the record of either felony murder with a different predicate crime or premeditated first degree murder. (*People v. Seaton* (2001) 26 Cal.4th 598, 645 ["when a prosecutor argues two theories to the jury, one of which is factually sufficient and one of which is not, the conviction need not be reversed, because the reviewing court must assume that the jury based its conviction on the theory supported by the evidence"]; *People v. Guiton* (1993) 4 Cal.4th 1116, 1129 ["If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground"].)

We conclude the evidence in this case was sufficient to convict defendants of felony murder with robbery as the predicate crime. Beginning with the law, "both section 211 and section 215 require a taking from the 'person or immediate presence' of the person" against the person's will and accomplished by means of force or fear. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 989.) However, while section 215 requires a "felonious taking of a motor vehicle in the possession of another" (§ 215, subd. (a)), section 211 more generally requires a "felonious taking of personal property in the possession of another" (§ 211).

Here, putting aside the lack of substantial evidence that Walker took the victim's Denali from the victim's immediate presence, we find the following evidence in the record that Walker took other personal property from the victim's person or immediate presence by means of force or fear. As mentioned above, eyewitness J.W. testified that Walker and the victim were arguing and struggling for something, which he believed may have been a gun, just before the fatal shot was fired. After hearing these shots, a nervous Morris insisted that Frazier leave the scene, yet he initially refused, insisting he needed to wait for "Tim." Yet, as the crowd from the scene was still frantically dispersing, Frazier finally agreed, driving away "really slow" in the Charger. Just minutes later, as they turned on Palou, Walker "popped up" from between two cars and got in the Charger. Walker, "out of breath," immediately told Frazier and Morris that he just "bust somebody" and needed to "go back to the car." Frazier thus drove on, as directed by Walker, to the victim's Denali, which was parked beneath the overpass less than a mile from the shooting. Once there, defendants left the Charger and walked to the Denali. After a brief moment, Frazier walked back to the Charger with Walker following close behind, carrying two items—"a comforter and a case." And just moments later, after defendants had driven only "one to two blocks," they were detained and arrested at Industrial and Revere, about "a mile, half a mile" or 10 to 15 blocks from the murder scene. Later that night, with information obtained from Morris, the police located and searched the Denali and found at least one door open and the victim's car keys still in the

ignition, which were last seen in the victim's possession at about 10:00 p.m.[8] The police also searched the Charger and found, among other things, a comforter and plastic case in the trunk.

This record, we conclude, constitutes substantial evidence of defendants' commission of murder in the course of a robbery. " 'Under the felony-murder rule, a strict causal or temporal relationship between the felony and the murder is not required; what is required is proof beyond a reasonable doubt that the felony and murder were part of one continuous transaction.' [Citation.]" (*People v. Johnson, supra*, 60 Cal.4th at p. 992.) The jury could reasonably infer based on the totality of circumstances in this case that Walker went to the area near Sam Jordan's to steal property from the victim and, in the course of executing this robbery, shot him after arguing and struggling with him for "[w]hat appeared to be . . . a gun," but what likely were his car keys. (See *People v. Zapien* (1993) 4 Cal.4th 929, 984 [affirming a jury's reasonable inference that the defendant fled without completing the robbery because he knew someone had called the police].) The jury could then reasonably infer that the robbery continued after Walker, out of breath, rejoined Frazier and Morris in the Charger; went "back" to the Denali (parked less than a mile away); and entered it, presumably with the victim's car keys, to take a comforter and plastic case from inside. (*Ibid*.) In addition, as mentioned above, after this threesome was detained and arrested about two blocks away from where the Denali was parked (and less than a mile from the murder scene), police searches were conducted that revealed the victim's keys still in the ignition of the Denali and the comforter and case in the Charger's trunk.

This collection of facts, viewed in a light favorable to the judgment, supports the prosecutor's theory that defendants' robbery of the victim's property and the victim's murder were part of one continuous transaction. (See *People v. Anderson* (2011) 51 Cal.4th 989, 994 [" '[t]he crime of robbery is a continuing offense that begins from the

[8] As noted, the victim's mother last saw her son drive off in his Denali at about 10:00 p.m. that evening.

time of the original taking until the robber reaches a place of relative safety' "].) Moreover, given our duty as the reviewing court to accept any and all logical inferences the jury might have drawn from both direct and circumstantial evidence, we find this evidence sufficient to prove felony-robbery murder. (*People v. Maury*, *supra*, 30 Cal.4th at p. 396; accord, *People v. Horning* (2004) 34 Cal.4th 871, 903 [circumstantial evidence permitted the reasonable inference that the defendant went to the victim's house to steal and killed while doing so].) Neither the relatively minimal value of the property taken—which included the victim's car keys used by defendants to enter his Denali and the comforter and case taken from within—nor the fact that the latter two items were stolen after the victim's murder undermines this theory. (*People v. Frye* (1998) 18 Cal.4th 894, 956 ["Defendant offers no authority for the proposition that a perpetrator who succeeds in killing his victim before taking the victim's personal property cannot be guilty of robbery. . . . So long as defendant formed the intent to take the [victims'] possessions before killing them, he was properly convicted of robbery"]; *People v. Graham* (1969) 71 Cal.2d 303, 326 ["If the evidence supports the elements of the offense of robbery, the lack of value of the asported matter cannot efface the crime"].)

Accordingly, the jury's first degree murder verdict against defendants may be affirmed on the felony-murder theory with robbery as the predicate crime. (*People v. Seaton*, *supra*, 26 Cal.4th at p. 645 [where a prosecutor argues two theories to the jury, only one of which is factually sufficient, the reviewing court must assume the jury based its conviction on the theory supported by the evidence and affirm].)

In addition, we find substantial evidence of premeditated and deliberate murder on our record. Our state's highest court has adopted a tripartite test for assessing whether the prosecution has successfully proved premeditated and deliberate murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27.) This test "requires us to focus upon evidence of (1) the defendant's *planning* activity prior to the killing; (2) his *motive* to kill, derived from his prior relationship or conduct with the victim; and (3) the *manner* of killing, indicating some preconceived design to kill in a certain way. Evidence of all three elements is not essential, however, to sustain a conviction. A reviewing court will sustain

a conviction where there exists evidence of all three elements, where there is 'extremely strong' evidence of prior planning activity, or where there exists evidence of a motive to kill, coupled with evidence of either planning activity or a manner of killing which indicates a preconceived design to kill." (*People v. Edwards* (1991) 54 Cal.3d 787, 813–814.)

Viewing the evidence most favorably to the prosecution, there was substantial evidence from which it could be inferred that defendants acted deliberately and according to a preconceived plan rather than from a rash impulse or in the heat of the moment in committing murder. For example, the circumstantial evidence of planning, which is the most important of the *Anderson* factors (*People v. Alcala* (1984) 36 Cal.3d 604, 627), includes the facts that defendants jointly obtained the gun used to commit the murder a few weeks beforehand; that defendants remained in regular contact by cell phone in the hours preceding the murder, as well as the moments following it; and that Frazier provided Walker transportation away from the crime scene and, later, to and away from the Denali, parked a mile away . In addition, following their arrest, police officers found in the Dodge Charger, among other things, one right-hand glove near the front seat (where Frazier was seated) and a pair of gloves in the rear seat (where Walker was seated).

With respect to the manner of killing, it was indeed "exact"—in that Walker, wearing a ski mask over his face, shot the victim multiple times, including once in the back as he tried to run away after struggling with Walker. And while defendants correctly note the evidence of motive is at best unclear, this circumstance, which is common in first degree murder cases, does not, by itself, invalidate the jury's murder verdict. As the California Supreme Court has recognized, " 'The reason persons commit despicable crimes is often a mystery in a land where an accused has a Fifth Amendment privilege.' We have never required the prosecution to prove a specific motive before affirming a judgment, even one of first degree murder. A senseless, random, but premeditated, killing supports a verdict of first degree murder." (*People v. Edwards, supra,* 54 Cal.3d at p. 814.) Accordingly, we conclude the evidence, considered as a

whole, meets the tripartite test set forth by the California Supreme Court, particularly when viewed in light of the legal mandate that we presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 916.) Stated another way, there is indeed a hypothesis, supported by substantial evidence in our record, by which a jury could have properly found that defendants' actions demonstrated a preconceived, intentional plan to kill, notwithstanding the insubstantial evidence of felony murder with the underlying offense of carjacking. (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1129 ["If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground"].)

However, according to defendants, even accepting that the evidence of premeditated murder was substantial, the jury's murder verdicts cannot stand on this record due to the prejudicial impact of the prosecutor's heavy reliance at trial on the invalid theory that they committed felony murder premised on carjacking (as opposed to premeditated murder or felony murder premised on robbery), and by the trial court's misleading and/or incomplete instructions on their joint liability for murder. As defendants point out, "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*People v. Chiu* (2014) 59 Cal.4th 155, 167 (*Chiu*).) We thus turn to defendants' instructional challenges with this standard of review in mind.

III. The Jury Instruction as to the Murder Count.

Defendants raise several challenges to the trial court's instructions to the jury with respect to the first degree murder count and, in particular, the lesser included offense of second degree murder. Defendants' particular arguments are addressed below. First, however, we set forth the legal framework that guides our inquiry.

The rules guiding our review of defendants' claims of instructional error are well established. Turning first to the substantive law, "[t]he elements of murder are (1) an

unlawful killing of a human being . . . (2) committed with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. (§ 188.) Malice is implied 'when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.' [Citation.]" (*People v. Timms* (2007) 151 Cal.App.4th 1292, 1296.)

With respect to the instructions, the following rules apply. "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

With these legal principles in mind, we return to defendants' arguments.

A. Instruction on Second Degree Murder.

Defendants' first challenge relates to the jury's instruction on homicide and, in particular, first and second degree murder. The relevant jury charge with respect to murder, based upon CALCRIM Nos. 520 and 521, reads as follows.[9]

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[9] The jury was also instructed on the lesser offense of manslaughter, per CALCRIM No. 570, as follows: "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

"The defendant killed someone because of a sudden quarrel or in the heat of passion if:

"1. The defendant was provoked;

"2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; [¶] AND

"3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

"If you decide that a defendant committed murder, then you must decide whether it is murder in the first or second degree. [CALCRIM No. 520]

"Each defendant has been prosecuted for first-degree murder under two theories. The first one, the murder was willful, deliberate, and premeditated, and the second is what we call felony murder. . . . [¶] . . . [¶] . . .

"A defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. . . . [¶] . . .[¶]

"A decision to kill made rashly, impulsively, and without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

"[The s]econd theory is felony murder, for which you will receive a separate instruction.

"The People have the burden of proving beyond a reasonable doubt that the killing was first-degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first-degree murder [and the murder is second degree murder]. [CALCRIM No. 521]"[10]

Defendants contend the trial court erred by omitting from its reading of CALCRIM No. 521 the language, bracketed and underlined above, found in the last paragraph of the standard instruction—"and the murder is second degree murder."[11]

"Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection."

[10] As defendants note, a former version of CALCRIM No. 521 contained additional language providing that, absent evidence of a statutory factor elevating murder to first degree (e.g., willful, deliberate, premeditated killing), " 'all other murders are of the second degree.' " This language was omitted in the October 2010 revision of CALCRIM No. 521, and the language defendants contend was erroneously omitted in this case was added. (CALCRIM No. 521 (2011 ed.) vol. 1, pp. 268–272.)

[11] As defendants reference, the bench notes to the 2011 and 2012 versions of CALCRIM No. 521 state, "The court **must give** the final paragraph in every case." However, the trial court's failure to abide by the bench notes is not legal error, much less

While defendants did not request this language, they contend the trial court had a sua sponte duty to provide it. Further, defendants contend the trial court's omission of this portion of the pattern instruction rendered the instruction, as given, misleading and ambiguous because the jury "[was] never told a generic murder was a second-degree murder."

Moreover, according to defendants, aggravating the trial court's failure to fully instruct on the last sentence of CALCRIM No. 521, the trial court also omitted from its reading of CALCRIM No. 520 the following language: " 'If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. [__].' " Instead, the last sentence of CALCRIM No. 520 read by the trial court provided: " 'If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree.' "

And, finally, defendants contend an even "more serious" problem stems from the court's reading of CALCRIM No. 570, the voluntary manslaughter instruction, which instructed that a defendant killed in the heat of passion or because of a sudden quarrel if, inter alia, the defendant was provoked and, "[a]s a result of the provocation, *the defendant acted rashly* and under the influence of intense emotion that obscured his reasoning or judgment." (Italics added.) According to defendants, this instruction, in conjunction with CALCRIM No. 521, was unduly confusing because "the only definition CALCRIM no. 521 provides for a lesser homicide offense to first-degree murder is a killing 'made rashly, impulsively and without careful consideration,' but CALCRIM no. 521 did not spell out for the jury that this would then be a second-degree murder. As this jury was also instructed by CALCRIM no. 570 on 'sudden passion' voluntary manslaughter, **which uses the term 'rashly,'** the potential for confusion is readily apparent."

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reversible error. (*People v. Baugh* (2018) 20 Cal.App.5th 438, 447 ["CALCRIM pattern jury instructions are 'not themselves legal authority' "].)

We reject this instructional challenge to the trial court's modified version of CALCRIM No. 521 for several reasons. First, the law is clear that a party may not complain on appeal that a jury instruction otherwise correct in the law and supported by the evidence is ambiguous or incomplete unless the party requested in the trial court a modification to, amplification of, or clarification of the challenged instruction. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570 [" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language' "]; *People v. Rundle* (2008) 43 Cal.4th 76, 151 ["[t]he long-standing general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given"], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Here, defendants acknowledge no such request was made by defense counsel, but nonetheless insist the trial court had a sua sponte duty to include in its reading of CALCRIM No. 521 the language "and the murder is second degree murder" because the bench notes to the pattern instruction as amended in spring 2014, *after* the trial in this case, state that "[t]he court **must give** the final paragraph in every case." (See CALCRIM No. 521 (2014 ed.) vol. 1, p. 246.) However, we are aware of no case law (and defendants identify none) holding that a CALCRIM bench note subjects the trial court to a sua sponte duty to give the pattern instruction in a particular way, even where, as here, the bench note did not exist at the time of trial and the entire instruction (including the final paragraph) was in fact given with the exception of the one aforementioned phrase.

Moreover, putting aside defendants' forfeiture of this instructional claim, the question on appeal is whether there is a reasonable likelihood the jury could have misconstrued or misapplied the law of homicide when the challenged instruction modeled on CALCRIM No. 521 is considered in light of the entire jury charge, as well as the record as a whole, not when it is considered in mere isolation. (*People v. Ramos*, *supra*, 163 Cal.App.4th at p. 1088.) Applying this rule here, we conclude there is no reasonable

likelihood that the jury misconstrued or misapplied the relevant law.

For one, the trial court instructed the jury on both CALCRIM No. 520 (first or second degree murder with malice aforethought) and CALCRIM No. 521 (the elements of first degree murder), as set forth above. And, after these instructions on the substantive law of murder were given, the jury was further instructed:

"[F]or each count charging murder, you will be given verdict forms for guilty and not guilty of first-degree murder, second-degree murder, and voluntary manslaughter. You may consider these different kinds of homicide in whatever order you wish, *but I can only accept a verdict of guilty or not guilty of second-degree murder or voluntary manslaughter only if all of you have found the defendant not guilty of first-degree murder*, and I can accept a verdict of guilty or not guilty on voluntary manslaughter only if all of you have found the defendant not guilty of both first- and second-degree murder. [¶] As with all of the charges in this case, to return a verdict of guilty or not guilty on a count, you must all agree on that decision. . . . [¶] *If all of you agree that the People have proved beyond a reasonable doubt that a defendant is guilty of first-degree murder, complete and sign that verdict form and do not complete or sign any other verdict forms for that count. If all of you cannot agree whether the defendant is guilty of first-degree murder, inform me that you cannot reach an agreement and do not complete or sign any verdict forms for that count*. [¶] If all of you agree that a defendant is not guilty of first-degree murder but also agree that the defendant is guilty of second-degree murder, complete and sign the form for not guilty on the first-degree murder and for guilty on the second-degree murder, and do not complete or sign any other verdict forms for that count." (Italics added.) As these instructions reflect, the jury was repeatedly told that to find defendants guilty of first degree murder, the prosecution was required to prove guilt beyond a reasonable doubt under either a premeditated murder or a felony-murder theory.

Thus, assuming, as we must, that the jury properly followed these instructions (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1336), the record reflects the jury found the People had in fact proved beyond a reasonable doubt that defendants committed first degree murder and, for that reason, returned the signed verdict form for that count

without reaching the subsidiary issue of whether they committed second degree murder. We decline defendants' invitation to infer, in the absence of any affirmative proof, that the jury only returned verdicts for first degree murder because they somehow misinterpreted or misapplied the instructions on second degree murder as stated in CALCRIM Nos. 520, 521, or 570. Indeed, defendants make no claim that the jury was misinstructed on the substantive law of first degree murder, and, moreover, as we have already concluded in this opinion, there was ample evidence supporting the prosecution's felony-murder theory with robbery as the predicate crime and based on the theory of premeditated murder.

Accordingly, defendants' challenge fails, as there is no reasonable likelihood that, on this record and in light of the jury charge as a whole, the jury misapplied the version of CALCRIM No. 521 provided by the trial court in this case. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 957 [" ' "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." ' [Citations.]"].)

B. Instruction on Juror Unanimity as It Relates to the Prosecution's Murder Theories.

Defendants raise another instructional challenge related to the jury's first degree murder verdicts, that the jury received confusing and inappropriate instructions relating to the issue of juror unanimity. Specifically, defendants acknowledge that, in connection with the instructions on the prosecution's two theories of first degree murder (premeditated and felony murder), the jury was correctly told that "all of you do not need to agree on the same theory." However, defendants claim it was error when the jury was given the following unanimity instruction modeled on CALCRIM No. 548 with respect to the prosecution's theories of first degree murder (felony murder) and second degree murder (malice aforethought): "Each defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder. [¶] Each theory of murder has different requirements, and I will instruct you on both. [¶] You may not find a defendant guilty of murder unless all of you agree that the People have proved that the

defendant committed murder under at least one of these theories. **You do not all need to agree on the same theory.**"

According to defendants, this instruction essentially told the jury, contrary to California law, that juror unanimity was not required when deciding whether the murder they committed was of the first or second degree. (See *People v. Diedrich* (1982) 31 Cal.3d 263, 280 [trial court erred by instructing the jury that the defendant could be convicted without the jurors' unanimous agreement on a single, specific act of bribery as the basis for the conviction].) Thus, defendants contend that, because their first degree murder convictions could have been based on findings by some jurors that premeditated murder or felony murder was proved, and by others that only murder with malice aforethought was proved, their convictions must be reversed or, at minimum, reduced to second degree murder.

Relevant to defendants' challenge, when "the jury is 'misinstructed on an element of the offense . . . reversal . . . is required unless we are able to conclude that the error was harmless beyond a reasonable doubt.' [Citations.]" (*People v. Wilkins* (2013) 56 Cal.4th 333, 348.) However, "[t]he failure to give a unanimity instruction may be harmless error if we can conclude beyond a reasonable doubt that all jurors must have unanimously agreed on the act(s) constituting the offense." (*People v. Norman* (2007) 157 Cal.App.4th 460, 466.)

In this case, as the People note, the jury was instructed on both CALCRIM No. 548 and CALCRIM No. 521. While CALCRIM No. 548 referred to "murder" generically, CALCRIM No. 521 was limited to the issue of first degree murder and, more specifically, to the two applicable first degree murder theories of premeditated murder and felony murder. Per CALCRIM No. 521, the jury was instructed, "[A]ll of you do not need to agree on the same theory." Subsequently, the jury was read CALCRIM No. 640, which clearly advised the jury that, to find defendants guilty of first degree murder, the jury had to unanimously agree that the People proved beyond a reasonable doubt that each defendant committed a first degree murder, defined, again, as either premeditated murder or felony murder. Moreover, even if the jury had initially been confused

regarding this requirement, the trial court, upon receiving verdicts finding defendants guilty of "murder," sent the jury back to continue deliberating with the clear instruction, "It needs to be a unanimous verdict *as to which degree*." (Italics added.) The jury thereafter returned with a verdict of first degree murder, a result confirmed by all 12 jurors in posttrial polling. This charge, considered as a whole, adequately instructed the jury on the issue of jury unanimity.

Further, in reaching this conclusion, we acknowledge Walker's contention that "jurors could not constitutionally 'unanimously' agree on first-degree murder if they were not told the difference between first- and second-degree murder." Yet defendants do not dispute that the jury was correctly instructed on the statutory elements of first degree murder, including the elements of "premeditated and deliberate" and "felony murder." And, as California case law makes clear, it is the *absence* of proof of one or more of the statutory elements of first degree murder that reduces a murder to second degree. (*People v. Hansen* (1994) 9 Cal.4th 300, 307 ["Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder"], overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1199.) In this case, as discussed above, the jury found no such absence of proof. As such, defendants' counterargument fails. (Cf. *People v. Sanchez* (2013) 221 Cal.App.4th 1012, 1024–1025 [holding the trial court committed reversible error by including language in CALCRIM No. 548 indicating "the jury need not be unanimous as to the theory of guilt" where only two theories of murder were presented, each of which led to a different degree of murder].)

Given these circumstances, even assuming the version of CALCRIM No. 548 read to the jury could be deemed confusing or ambiguous because it failed to clarify that jury unanimity was required when deciding whether defendants committed first degree murder (for which two theories were provided) or second degree murder (for which only one theory was provided), we would nonetheless conclude any such confusion or ambiguity was harmless. As before, considering the record in this case as a whole, we

find no reasonable likelihood the jury could have misapplied the court's homicide instructions in a way that could have caused defendants undue prejudice. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 957.) We thus proceed to the next issue.

C. Instruction on Liability for Acts of Coconspirators.

Defendants next challenge the trial court's instruction in accordance with CALCRIM No. 417 regarding liability for acts of coconspirators. Defendants contend this instruction, as given, misled the jury into believing Frazier, the nonshooting defendant, could be convicted of first degree murder regardless of whether he, as coconspirator, harbored the intent to commit premeditated murder. They reason that "appellant could be held liable for first-degree murder as a co-conspirator only if the shooter/perpetrator's **premeditation** was a natural and probable consequence of the [conspiracy's] target crime of carjacking [and/or robbery or attempted robbery]."[12]

As defendants note, the jury was first instructed per CALCRIM No. 415 that a person may be guilty of a crime either because he or she actually committed the crime or because he or she aided and abetted the actual perpetrator or because he or she was a member of a conspiracy. The jury was then read the following instruction per CALCRIM No. 417, which defendants challenge as improper:

"To prove that a defendant is guilty of the crime of murder charged in Count 1, the People must prove that the defendant conspired to commit the crime of carjacking, a member of the conspiracy committed murder to further the conspiracy, and the murder

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[12] As previously mentioned, following defendants' convictions and sentencing in this case, California law changed with respect to felony murder and the natural and probable consequences doctrine. In supplemental briefing, defendants seek reversal and remand of their murder convictions based on these changes. We address, and deny, their requests elsewhere in this opinion. For the purposes of this appeal, we have thus considered the law that existed at the time of trial with respect to felony murder and the natural and probable consequences doctrine to the extent these doctrines are implicated by the issues raised herein. (See *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1158 [the reviewing court discussed the natural and probable consequences doctrine as it existed at the time of trial to the extent the doctrine was implicated by the issues raised by the defendants on appeal].)

was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit." Further, "natural and probable consequence," as used in this instruction, is defined to mean the following: "A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. [¶] In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan."

As an initial matter, the People insist defendants have forfeited the right to raise this challenge to CALCRIM No. 417 on appeal because they failed to object to the instruction as drafted or to seek any modification or clarification of it before the trial court. We agree. (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 570; *People v. Rundle*, *supra*, 43 Cal.4th at p. 151.) However, even assuming for the sake of argument that defendants have not forfeited the right to make this challenge and that the court's instruction was incomplete or confusing,[13] we are nonetheless confident no harm resulted.

[13] We reject defendants' claim that the instruction, as read, was an incorrect statement of the law, particularly in light of their failure to identify any particular flaw in the instruction. (*People v. Fedalizo* (2016) 246 Cal.App.4th 98, 105 [" 'Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error' "].) As discussed below, the California Supreme Court decided after the trial in this case that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Chiu*, *supra*, 59 Cal.4th at pp. 164–166.) However, the high court's holding does not necessarily render the instruction given in this case incorrect. And in any event, defendants' argument appears to be that the instruction is incomplete or confusing (rather than incorrect) in light of *Chiu* because it fails to clarify how the natural and probable consequences doctrine operates in cases, such as this, involving multiple theories of first degree murder involving both the perpetrator and the aider and abettor. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 902 ["The fact that the current CALCRIM instruction includes additional clarifying language to better assist jurors in applying the natural and probable consequences

In reaching this conclusion, we acknowledge defendants' point that, under the natural and probable consequences doctrine, where the perpetrator commits first degree murder, the conspiring or aiding and abetting defendant's culpability is limited to second degree murder because the "connection between the [coconspirator or aider and abettor's] culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability . . . ." (*Chiu*, *supra*, 59 Cal.4th at pp. 164–166.)[14] However, in this case, we agree with the People that the prosecutor did not significantly rely upon the natural and probable consequences doctrine when arguing defendants' culpability. Rather, the prosecutor theorized to the jury that the nonshooter defendant may be culpable as a principal for directly assisting in the deadly shooting. As the California Supreme Court explained in *Chiu*, there are two forms of culpability for aiders and abettors: " 'First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." ' " (*Id.* at p. 158.) And, while an aider and abettor cannot be found to have committed premeditated first degree murder under the natural and probable consequences doctrine, "[a]n aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder." (*Id.* at p. 167; accord, *People v. McCoy* (2001) 25 Cal.4th 1111, 1116–1117 [" 'All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in

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doctrine does not mean that the absence of such language in the version of CALJIC given at defendant's 1998 trial makes the instruction incorrect"].)

[14] The *Chiu* court was concerned with the derivative liability of an aider and abettor (CALCRIM No. 403) and not of a coconspirator (CALCRIM No. 417). Nonetheless, the legal analysis for these two forms of derivative liability is in all relevant regards the same.

any crime so committed.' (Pen. Code, § 31; [citations].) Thus, a person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts . . . based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state"].)

In addition, where, as here, the jury is presented with a theory of first degree felony murder, "an accomplice is liable for killings occurring while the killer was acting in furtherance of a criminal purpose common to himself and the accomplice, or while the killer and the accomplice were jointly engaged in the felonious enterprise. [Citation.] In order to support defendant's conviction as an aider and abettor [of felony murder], therefore, the record must contain substantial evidence that (a) [the perpetrator] committed the robbery [to wit, the felony offense] (the perpetrator's actus reus), (b) defendant knew [the perpetrator's] intent to rob [to wit, to commit the felony] and intended to assist in the [commission of the felony] (the aider and abettor's mens rea), and (c) defendant engaged in acts that assisted the [felony] (the aider and abettor's actus reus)." (*People v. Thompson* (2010) 49 Cal.4th 79, 117.) Here, the jury was given the following instruction, modeled on CALCRIM No. 540B, with respect to accomplice liability for felony murder:

"The defendant may also be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. . . . [¶] To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

"1. The defendant committed, aided and abetted, or was a member of a conspiracy to commit Carjacking and/or Robbery;

"2. The defendant intended to commit, or intended to aid and abet the perpetrator in committing, or intended that one or more of the members of the conspiracy commit Carjacking and/or Robbery;

"3. If the defendant did not personally commit Carjacking and/or Robbery or Attempted Robbery, then a perpetrator, whom the defendant was aiding and abetting or with whom the defendant conspired, personally committed Carjacking and/or Robbery or Attempted Robbery;

"AND

"4. While committing a Carjacking and/or Robbery or Attempted Robbery the perpetrator caused the death of another person;

"AND

"5. There was a logical connection between the cause of death and the Carjacking and/or Robbery or Attempted Robbery. . . .

"A person may be guilty of felony murder even if the killing was unintentional, accidental or negligent."

Defendants do not challenge the trial court's reading of CALCRIM No. 540B. And when "a trial court instructs a jury on two theories of guilt [for accomplices or coconspirators], one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra*, 59 Cal.4th at p. 167.) Thus, in *Chiu*, the California Supreme Court held a "[d]efendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Ibid*.) Applying this rule, the California Supreme Court found reversal was required because "there was no basis in the record to conclude that the verdict was based on the legally valid theory that defendant directly aided and abetted the murder." (*Id.* at p. 168.) In particular, the court noted the existence of a holdout juror, who "could not find defendant guilty of first degree murder, being unable to place defendant in the 'shoes of' [the shooter], and thus could not attribute [his] premeditated murder to defendant." (*Ibid.*)

Our case, however, differs. As noted above, the prosecutor's primary argument during summation was that Frazier, the nonshooting defendant, could be held liable for first degree murder based upon his own participation in and facilitation of the crime. On the other hand, the prosecutor only briefly mentioned natural and probable

consequences.[15] For example, the prosecutor began her summation by explaining, "He was murdered. He was shot in the back." She further noted that "*Mr. Frazier and Mr. Walker brought the instrumentalities to commit murder*"; "what is clear is that at the time [Frazier] drove [Walker] there, *he provided him with the means to rob and kill* [*the victim*]." (Italics added.) And, later, the prosecutor added: "The charges we have are first-degree murder. Each defendant is guilty under one or two theories. . . . They can be guilty of that if either it is a felony murder . . . or a willful, deliberate, premeditated murder. . . . [¶] . . . It does not matter if his killing was unintentional or accidental or negligent. Of course, it wasn't in this case, it was deliberate. There were two shots fired. One in his back." Finally, in her rebuttal argument, the prosecutor quite directly stated: "[Defense counsel] started out saying Mr. Frazier's not guilty of murder because he didn't pull the trigger, and that's just not the law. He's just as guilty as an aider and abettor."

We have, of course, already determined the evidence does not support the jury's carjacking finding. In a case, like this, of factual inadequacy, the error is one of state law, and we will affirm "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty *solely on the unsupported theory*." (*People v. Guiton, supra,* 4 Cal.4th at p. 1130, italics added.) Further, under this standard, an instruction on an invalid theory may be found harmless when " 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' " under a factually supported theory. (*People v. Covarrubias, supra,* 1 Cal.5th at p. 882.) To illustrate, in *People v. Covarrubias*, a

[15] Defense counsel appears to have understood this fact. When the trial court asked at one point during a bench conference whether defense counsel was referring to the instruction on natural and probable consequences, defense counsel responded, "That's not applicable here." As such, it appears defense counsel may have invited the very error defendants now invoke as a basis for reversal. (See *People v. Wader* (1993) 5 Cal.4th 610, 657–658 [declining to consider argument raised on appeal that the court erred by not giving a particular instruction where, at trial, defense counsel made a strategic choice to forgo the instruction].)

decision postdating *Chiu* that likewise involved multiple theories of first degree murder (including felony murder), the California Supreme Court noted "one appropriate method of assessing the prejudicial effect of this type of error [in instructing on derivative liability for murder under the natural and probable consequences doctrine] is to determine whether 'other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary' to support a valid theory of liability." (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 902, fn. 26.) After applying this method, the high court concluded reversal on the basis of *Chiu* was not warranted because the record there indicated the jury was properly instructed on valid theories of first degree felony murder with underlying offenses of robbery and burglary, and the jury's guilty verdicts and true findings reflected that it made the findings necessary to support valid guilty verdicts on the murder charges. Accordingly, the high court concluded the instructional error under *Chiu* was harmless beyond a reasonable doubt. (*Ibid.*)

We reach the same conclusion here. Notwithstanding the factual inadequacy of the carjacking finding, the jury was properly instructed on valid theories of first degree felony murder with the underlying offense of robbery and of willful, premeditated and deliberate murder. As discussed above, the carjacking statute requires a "felonious taking of *a motor vehicle* in the possession of another" (§ 215, subd. (a), italics added), while the robbery statute merely requires a "felonious taking of personal property in the possession of another" (§ 211). Given the overlapping nature of these two related crimes, a jury can, in a case like ours, make all the findings necessary to support a defendant's conviction on the legally valid theory of felony murder with robbery as the predicate notwithstanding the insufficiency of the evidence to prove a carjacking. (*People v. Magallanes* (2009) 173 Cal.App.4th 529, 535 ["robbery[] and carjacking are, at root, crimes involving the *taking* of personal property"].) Specifically, putting aside the insufficiency of the evidence to prove that Walker took the victim's Denali from his immediate presence, the evidence was nonetheless sufficient to prove that, after Walker fatally shot the victim in the back following some sort of struggle, defendants then drove to the Denali, entered it with the victim's keys and feloniously took the victim's personal property, including his

comforter and case (items later discovered in the Charger's trunk). The record thus leaves no doubt the jury found defendants took personal property from the victim during the course of his murder.

Moreover, with respect to deliberate and premeditated murder, while Walker may have been the direct perpetrator, the record reflects numerous facilitative acts by Frazier, including his involvement in buying the murder weapon and ammunition a few weeks before the crime; communicating by cell phone with Walker immediately before and after the murder; and providing Walker transportation to the murder scene, back to the victim's Denali after the murder and, ultimately, away from the murder scene shortly before their arrest. Indeed, neither defendant argued in closing that he was only guilty of second degree murder. To the contrary, Walker's attorney denied he was even at the scene and Frazier's attorney focused on Morris's testimony that Walker, not Frazier, gave her the gun after the shooting.[16]

Under these unique circumstances, the record reflects that, notwithstanding the factual inadequacy of the carjacking finding because there is no evidence defendants took a vehicle, or any instructional error related to the natural and probable consequences doctrine, the jury made the necessary findings to support guilty verdicts for first degree murder for both the direct perpetrator (Walker) and the aider and abettor (Frazier).[17] Accordingly, because it is not reasonably probable the jury "in fact found [defendants] guilty *solely* on the unsupported [felony-carjacking murder] theory," the verdicts may

[16] Frazier's counsel argued the victim's death may have been an accident following an argument between the victim and shooter, prompting the court's instruction on sudden quarrel, heat of passion manslaughter.

[17] Contrary to defendants' claim, the jury's seemingly inconsistent findings that Walker did not personally discharge a firearm causing death or unlawfully possess a firearm do not undermine the validity of these verdicts. (See *People v. York* (1992) 11 Cal.App.4th 1506, 1510 ["Inconsistent findings by the jury frequently result from leniency, mercy or confusion. [Citation.] Such inconsistencies in no way invalidate the jury's findings"].)

stand. (*People v. Guiton, supra*, 4 Cal.4th at p. 1130, italics added; *People v. Covarrubias, supra*, 1 Cal.5th at p. 882; cf. *Chiu, supra*, 59 Cal.4th at pp. 167–168.)

D. Instruction on Aiding and Abetting, CALCRIM No. 403.

Lastly, Walker makes the additional argument that the trial court committed prejudicial error by failing to discharge its sua sponte duty to instruct the jury according to CALCRIM No. 403, the pattern instruction on "natural and probable consequences" where derivative liability is based on aiding and abetting. He reasons that the trial court was obligated to give this instruction because aiding and abetting was the prosecutor's primary theory of derivative liability for murder. In so arguing, Walker acknowledges, first, that he failed to request instruction on CALCRIM No. 403 and, second, that the trial court did instruct the jury on two other aiding and abetting instructions—to wit, CALCRIM Nos. 400 and 401.[18]

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[18] The versions of CALCRIM Nos. 400 and 401 read to the jury were as follows:

CALCRIM No. 400: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime.

"A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator.

"Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

CALCRIM No. 401: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

"1. The perpetrator committed the crime;

"2. The defendant knew that the perpetrator intended to commit the crime;

"3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

"AND

"4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone *aids and abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

"If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

Our reasoning from above in rejecting defendants' related argument that the trial court erred by misleading the jury regarding the natural and probable consequences doctrine when giving CALCRIM No. 417 likewise defeats this argument. To briefly restate, first, the prosecutor's primary theory of derivative liability was not natural and probable consequences, but, rather, direct aiding and abetting of either felony murder or premeditated murder. (See *Chiu*, *supra*, 59 Cal.4th at p. 167 ["An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder"].) Second, the jury was properly instructed on the prosecution's dual first degree murder theories, including premeditated murder and felony murder based upon robbery or attempted robbery, as well as aiding and abetting per CALCRIM Nos. 400 and 401 and coconspirator liability per CALCRIM No. 417. Even assuming for the sake of argument that error occurred (a conclusion we decline to draw), there would be no basis for finding prejudice. Accordingly, we conclude any instructional error relating to the omission of CALCRIM No. 403 was harmless beyond a reasonable doubt. (See *People v. Covarrubias*, *supra*, 1 Cal.5th at p. 902.)

IV. Ordering the Jury to Continue Deliberations to Decide the Appropriate Degree of Murder.

Defendants next contend that the trial court acted in excess of its jurisdiction when it polled the jurors, accepted their verdict of "murder," and released the jurors, only to later order them to redeliberate the degree of murder, after which they returned a verdict of first degree murder. The People counter that the trial court's decision to order the jury to return for further deliberations in order to clarify whether the murder verdict was of the first or second degree was appropriate because, one, the jury had not yet been discharged

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"If you conclude that [the] defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor." (Italics added.)

and, thus, had not left court or conversed with nonjurors and, two, it was necessary to avoid a later mistrial on account of an irregular verdict. We agree with the People.

The relevant record is not in dispute. On June 28, 2012, the jury advised the trial court that it had reached verdicts. The verdicts were thus read aloud in open court, including the verdicts finding defendants guilty of "murder"; the jury was polled; and the court announced to the jury that its service had concluded and the jurors were "now free to go." However, immediately after the court's announcement, the prosecutor approached and asked to speak to the judge before the jury was discharged. A sidebar discussion was then held with all counsel present. When the trial judge returned to the bench, she advised the jury that it would need to return to deliberations for the purpose of clarifying whether the guilty verdicts on the murder count were first or second degree murder. After the jury, at its request, received further instruction from the court regarding the relevant jury instructions on first and second degree murder, the jury returned with verdicts finding defendants guilty of first degree murder.

In contending the trial court's decision to order the jury to continue deliberating for the purpose of deciding whether defendants committed first or second degree murder was a violation of their due process rights, defendants rely on *People v. Lee Yune Chong* (1892) 94 Cal. 379 (*Chong*). In *Chong*, the jury reached a verdict finding the defendant guilty of murder, the verdict was recorded, and the jury was discharged. The trial judge then retired to his chambers and the jury dispersed, with several jurors commingling with nonjurors and others leaving the courthouse. At that point, the judge realized the jury had failed to specify whether its verdict was first degree or second degree murder, and so returned to the bench to vacate the verdict as to the defendant and call back the jury to revise it to specify the appropriate degree. Ultimately, the revised verdict was for first degree murder. (*Id.* at pp. 383–384.)

The California Supreme Court in *Chong* concluded that the trial court's decision to vacate the verdict and recall the jury was reversible error because the jury had in fact been discharged and the proceedings had ended. As the court described the situation, the jurors had returned to their role as private citizens, and were "beyond the control of the

court, had thrown off their characters as jurors, and had mingled with their fellow citizens, free from any official obligation." (*Chong*, *supra*, 94 Cal. at pp. 384–385.) As such, "all the proceedings by which the court reassembled the persons who had constituted the jury, and instructed them to find another verdict, and the so-called second verdict itself, were nullities." (*Ibid.*)

We find *Chong* inapposite for several reasons. Not only had the jury in this case not been discharged, the jurors remained in the courtroom under the trial court's control and had no opportunity to discuss the case with nonjurors. Thus, given the clear irregularity of the murder verdicts as a result of the jury's failure to specify the appropriate degree of murder, the trial court acted well within the scope of its authority to send the jury back to deliberate this issue. Rather than interfering with a valid verdict, the trial court acted appropriately, before the jurors were exposed to any outside influences, to avert a mistrial based on a wholly avoidable procedural error. (*People v. Kimbell* (2008) 168 Cal.App.4th 904, 908.) Accordingly, we reject defendants' claim that a violation of their due process rights occurred.

V. Denial of Defendants' Motions for New Trial Based upon Juror Misconduct.

Defendants next contend that the trial court erred by denying their motions for new trial based upon the alleged misconduct of one of the jurors, referred to herein as juror x.[19] According to defendants, juror x engaged in misconduct by failing to disclose in his juror questionnaire that he had previously worked for law enforcement in Florida and by introducing into deliberations "unsworn, extrajudicial 'expert' testimony" regarding a defense exhibit reflecting a Bay Area cell phone tower map. In doing so,

[19] Below, both defendants moved for new trial, with Frazier joining in Walker's arguments only to the extent Walker was challenging juror x's honesty during voir dire regarding his prior association with law enforcement. Although Walker has not renewed this "honesty" argument on appeal, Frazier nonetheless seeks to join Walker's entire argument on appeal as it applies to him. We need not address the propriety of Frazier's position because, for reasons that follow, we reject Walker's challenge to the trial court's refusal to grant a new trial.

defendants continue, "this juror cast doubt on the credibility of appellant's version of events, which had been presented to the jurors by way of appellant's statement to police."

As relevant here, a new trial may be granted when "the jury has received any evidence out of court, other than that resulting from a view of the premises, or of personal property" (§ 1181, subd. 2), or "the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented" (§ 1181, subd. 3). In ruling on a motion for new trial, "any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly"; however, "[n]o evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." (Evid. Code, § 1150, subd. (a).) We review a ruling on a motion for new trial on appeal only for " ' "a manifest and unmistakable abuse of discretion . . . ." ' " (*People v. Delgado* (1993) 5 Cal.4th 312, 328.)

To support his motion for new trial, Walker submitted a statement from another juror (juror number two), describing conduct by juror x during deliberations. According to juror number two's statement, she recalled juror x, who was the jury foreperson, "announced that he knew the field of cell phone technology as he had used it in his work for a police department in Florida," and opined to the others "that the concept of using phones to track location was over-rated[.]" Juror number two also reported that "[juror x] . . . declared that [the defense's cell phone tower map exhibit] could only be viewed as unreliable . . . [because] the technology didn't exist to precisely determine tower range and to accurately pinpoint calls[.]" Finally, juror number two stated that when, during deliberations, she asserted to the others that Walker had made a call from his home before the shooting, "[juror x] dismissed my assertion and indicated that there was nothing to support my premise. He maintained the calls showed Walker in the vicinity of 3rd and Galvez even though I thought I had heard testimony about a home-based call[.]"

The defense also submitted a declaration from a defense investigator attesting that, after the jury was released, he spoke with juror x, who told him that he had previously been employed by "Emergency 911" in Florida, where he was told by a coworker "that the only way to precisely locate a person's cell phone is through triangulation, requiring data from three towers." This information, which he discussed with other jurors, caused him to discredit the information presented by a defense expert through use of cell phone tower maps at trial.

Finally, juror x was himself examined in open court by the trial judge pursuant to Code of Civil Procedure section 237. Juror x testified that, among other things, he did not "find any degree of accuracy" in the cell phone tower maps introduced by the defense expert and that he may have mentioned to the others, with regard to pinpointing the location of cell phone calls, his belief "that they do this by GPS now and that you could triangulate signals from various towers." However, juror x denied introducing into deliberations any outside or extraneous information "with regard to the [expert's] charts . . . ." Further, while he did not recall telling the other jurors about his professional background, he did recall chatting with other jurors "during breaks and stuff" about his work in telecommunications. Finally, juror x recalled other jurors had also indicated their desire for "a more . . . concrete . . . determination of [cell phone call] location."

As an initial matter, the People challenge the admissibility of both juror number two's statement and the defense investigator's declaration on hearsay grounds, correctly noting, " 'a jury verdict may not be impeached by hearsay affidavits.' " (*People v. Williams* (1988) 45 Cal.3d 1268, 1318; see also *People v. Cox* (1991) 53 Cal.3d 618, 697 [concluding a defense investigator's affidavit recounting his discussion with a juror was not competent evidence with which to impeach a verdict], disapproved on other grounds in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.) However, even putting aside the questionable competency of defendants' evidence, we conclude the trial court's refusal to grant them a new trial was, in any event, a proper exercise of discretion.

The record reflects the trial court accepted juror x's denial in testimony that he had introduced any outside or extraneous evidence into deliberations regarding cell phone

tracking capability or accuracy. The trial court thus accepted juror x's testimony that he had merely shared his belief, based on his personal experiences, that the defense evidence regarding cell phone tower locations and triangulation did not seem accurate, and that other means were available to obtain this information that would have been more accurate (mainly, GPS). These decisions by the trial court with respect to juror x's testimony were within the broad scope of its discretion in ruling on a motion for new trial: " ' "It is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work. A juror, however, should not discuss an opinion explicitly based on specialized information obtained from outside sources. Such injection of external information in the form of a juror's own claim to expertise or specialized knowledge of an issue is misconduct." ' [Citations.]" (*People v. San Nicolas* (2004) 34 Cal.4th 614, 649.)

Thus, applying these principles to the situation at hand, we conclude the trial court appropriately accepted that juror x's shared opinions on the subject of cell phone tracking was " ' "an opinion on a technical subject" ' " based on his educational or employment background, rather than " ' "an opinion explicitly based on specialized information obtained from outside sources." ' " Despite defendants' insistence, nothing in the record compels the opposite conclusion. (See *People v. San Nicolas*, *supra*, 34 Cal.4th at p. 650 [" 'we must allow . . . jurors to use their experience in evaluating and interpreting that evidence . . . [as] it is virtually impossible to divorce completely one's background from one's analysis of the evidence' "].) Moreover, while defendants emphasize the arguably inconsistent statements of juror number two that juror x did in fact introduce extraneous "expert" opinions into deliberations, juror number two's statements do not necessarily undermine the credibility of juror x's contrary testimony. It is axiomatic that, on appeal, we defer to the trial court's credibility determinations given that it is the trial judge, not the justices of this court, who has the opportunity to assess first-hand the words and demeanor of live witnesses, and thereby more accurately decide their reliability. (See,

e.g., *People v. Hedgecock* (1990) 51 Cal.3d 395, 417.) Accordingly, we decline to disturb the trial court's decision not to order a new trial.

VI. Denial of Walker's Motion for Postconviction Access to Jurors.

Next, Walker contends the trial court erroneously denied his posttrial motion for release of juror identifying information so that he could attempt to obtain evidentiary support for his previously discussed motion for new trial (which we have just affirmed).[20] Walker reasons that, "absent contact information for the other jurors, counsel would not be able to fully investigate this misconduct or properly present the motion for a new trial."

Code of Civil Procedure section 237, subdivision (b) requires a defendant seeking release of juror information to make a threshold showing of good cause, meaning facts sufficient " 'to support a reasonable belief that jury misconduct occurred, that diligent efforts were made to contact the jurors through other means, and that further investigation is necessary to provide the court with adequate information to rule on a motion for new trial. . . .' " (*Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1093–1094; see also *People v. Wilson* (1996) 43 Cal.App.4th 839, 850.) We review the trial court's decision for abuse of discretion. (*People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

In this case, Walker's motion for release of juror information was supported by a declaration from defense counsel, in which counsel attested that she believed a juror (juror x) had failed to disclose in his juror questionnaire his previous employment for law enforcement in Florida, and had discussed with other jurors his knowledge of cell phone tower triangulation as it related to the defense expert's use of cell phone tower maps. Counsel also attested that "at least one other juror [juror number two] has confirmed that

[20] When defense counsel first advised the trial court of her intent to file this motion and to investigate potential misconduct by one juror, the court sent a letter to all jurors that served at trial indicating counsel was interested in speaking to them about the case and providing contact information for all three trial attorneys. Each of the three attorneys later confirmed to the court that he or she had spoken to one juror—juror number two—and the court instructed defense counsel that any motion for release of juror information would need to be supported by a showing of good cause.

[juror x] discussed his prior job, his prior experience and knowledge and that based on that, the defense evidence was unreliable and was to be disregarded."

However, when the trial court subsequently examined juror x in connection with this motion pursuant to Code of Civil Procedure section 237, he confirmed that he had worked for the fire department in Florida as a 911 field technician, not the police department, and that he did not work with 911 calls, but, rather, his work involved ensuring "people had their correct addresses posted" and "doing the set-up of the grid[.]" Further, as discussed previously, juror x denied introducing any outside or extraneous information during deliberations or presenting himself to the other jurors as an expert in the field of telecommunications; rather, he had simply expressed his personal opinions that the defense evidence regarding "pinpointing . . . the locations" of cell phone calls was not accurate, and that "they do this by GPS now and that you could triangulate signals from various towers." This testimony provided a reasonable basis for the trial court's conclusion that release of sealed juror information was unwarranted given the unlikelihood that further investigation would reveal juror misconduct. (See *Townsel v. Superior Court*, *supra*, 20 Cal.4th at p. 1092 [recognizing the trial court has broad discretion to balance in a particular case the " 'strong public policies protect[ing] discharged jurors from improperly intrusive conduct in all cases' " and "the equally weighty public policy that criminal defendants are entitled to jury verdicts untainted by prejudicial juror misconduct"]; see also *People v. San Nicolas*, *supra*, 34 Cal.4th at p. 650 [" 'if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence' "]; *People v. Wilson*, *supra*, 43 Cal.App.4th at p. 850.) Accordingly, the trial court's ruling stands.

VII. The Trial Court's Acceptance of Defendants' Prior Conviction Admissions.

Defendants contend that the trial court erred by failing to advise them of their rights to a jury trial, to remain silent, and to confront adverse witnesses before accepting their admissions of having sustained prior felony convictions, such that their admissions were not knowing and voluntary. The People concede this error occurred, agreeing with

defendants this court must vacate the judgment as to both defendants and remand the matter for a retrial limited to the prior conviction allegations. We likewise agree.

Generally, where a defendant fails to expressly waive all his trial rights with respect to a prior conviction allegation after receiving a partial advisement of rights by the court, the test is whether, based on a totality of the circumstances, the record demonstrates the defendant nonetheless made a voluntary and intelligent waiver. (*People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 3 ["Ideally, a defendant admits a prior conviction only after receiving, and expressly waiving, standard advisements of the rights to a trial, to remain silent, and to confront adverse witnesses"]; accord, *People v. Johnson* (1993) 15 Cal.App.4th 169, 177 [" '[E]xplicit admonitions and waivers [of the right to jury trial and confrontation and of the privilege against self-incrimination] are still required in this state' "].) However, where, as here, the record is silent as to whether the defendant was expressly advised of, and thereafter expressly waived, these rights, there is no basis for the court to "infer that in admitting the prior the defendant has knowingly and intelligently waived [the right to a trial] as well as the associated rights to silence and confrontation of witnesses." (*People v. Mosby*, at p. 362.) In such case, "[this] error compels reversal of the prior conviction findings," and "[r]etrial of the prior conviction findings is permissible." (*People v. Sifuentes*, *supra*, 195 Cal.App.4th at p. 1421.) We conclude the same course of action is required in this case.

Moreover, given our conclusion that remand is necessary for the purpose of a retrial for the reasons identified, we need not consider Walker's ancillary argument that the trial court failed to establish the truth of his prior second degree robbery conviction, which was also alleged to be a felony "strike" offense committed within five years of the instant crimes and for which he served a state prison term. (§§ 667.5, subd. (b), 667, subds. (a)(1) & (d).) To the extent Walker is correct that the trial court failed to make specific findings as to each of these separate allegations relating to his 2007 conviction for second degree robbery, any such error can be avoided on remand.

Accordingly, we vacate the judgments and remand for retrial on this issue.

VIII. Development of the Record for Future Youth Offender Parole Hearing.

In supplemental briefing filed on January 29, 2018, Walker relies upon recent changes in our criminal law to argue for the first time that, because he was under age 25 when he committed these crimes, he is entitled to a limited remand for a hearing to make a record of information relevant to his eventual youth offender parole hearing as contemplated by sections 3051 and 4801. The People agree Walker is entitled to such a hearing, as do we.

As explained by the California Supreme Court in *People v. Franklin, supra,* 63 Cal.4th 261, "[s]ection 3051 . . . effectively reforms the parole eligibility date of a juvenile offender's original sentence so that the longest possible term of incarceration before parole eligibility is 25 years." (*Id*. at p. 281.) More specifically, "the combined operation of section 3051, section 3046, subdivision (c), and section 4801 means that [a defendant considered a youth offender] is [deemed to be] serving a life sentence that includes a meaningful opportunity for release during his 25th year of incarceration."[21] (*Id*. at pp. 279–280.)

"The statutory text makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction. . . . In addition, [former] section 3051, subdivision (i) says: 'The board shall complete all youth offender parole hearings for individuals who became entitled to have their parole suitability considered at a youth offender parole hearing prior to the effective date of [this section] by July 1, 2015.' This provision would be meaningless if the statute did not apply to juvenile offenders already sentenced at the

[21] When *People v. Franklin* was decided, section 3051, subdivision (b) provided that defendants who were under age 23 when they committed their crimes were entitled to youth offender parole hearings. (*People v. Franklin*, *supra*, 63 Cal.4th at p. 278.) Effective January 1, 2018, section 3051 was amended to afford the right to such hearings to defendants who were under age 25 when committing their crimes. (§ 3051, subd. (a)(1), as amended by Stats. 2017, ch. 684, § 1.5, No. 7 West's Cal. Legis. Service, p. 5125.) Undisputed, Walker was age 24 when he committed these crimes.

time of enactment." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 278, first bracketed insertion added.)

Moreover, "[t]he Legislature has declared that '[t]he youth offender parole hearing to consider release shall provide for a meaningful opportunity to obtain release' (§ 3051, subd. (e)) and that in order to provide such a meaningful opportunity, the [Parole] Board 'shall give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity' (§ 4801, subd. (c)). These statutory provisions echo language in constitutional decisions of the high court and this court. (See *Miller* [*v. Alabama* (2012)] 567 U.S. [460,] 477 . . . ['chronological age and its hallmark features']; *Graham* [*v. Florida* (2010)] 560 U.S. [48,] 75 ['meaningful opportunity to obtain release']; *Roper* [*v. Simmons* (2005)] 543 U.S. [551,] 571 ['diminished culpability of juveniles']; accord, [*People v.*] *Caballero* [(2012)] 55 Cal.4th [262,] 268, fn. 4.) The core recognition underlying this body of case law is that children are, as a class, 'constitutionally different from adults' due to 'distinctive attributes of youth' that 'diminish the penological justifications for imposing the harshest sentences on juvenile offenders.' (*Miller*, at p. 472 . . . .) Among these 'hallmark features' of youth are 'immaturity, impetuosity, and failure to appreciate risks and consequences,' as well as the capacity for growth and change. (*Id*. at p. 477 . . . .) It is because of these 'marked and well understood' differences between children and adults (*Roper*, at p. 572) that the law categorically prohibits the imposition of certain penalties, including mandatory LWOP [life without the possibility of parole], on juvenile offenders [citation]." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 283.)

"In directing the Board to 'give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner' (§ 4801, subd. (c)), the statutes also contemplate that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. For example, section 3051, subdivision (f)(2) provides that '[f]amily members, friends, school personnel, faith

leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board.' Assembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. (*Ibid.*) In addition, section 3051, subdivision (f)(1) provides that any 'psychological evaluations and risk assessment instruments' used by the Board in assessing growth and maturity 'shall take into consideration . . . any subsequent growth and increased maturity of the individual.' Consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he was a juvenile. (*Ibid.*)" (*People v. Franklin, supra,* 63 Cal.4th at pp. 283–284.)

Thus, applying these principles, the California Supreme Court held in *People v. Franklin* that, because it was unclear whether the defendant had sufficient opportunity to put on the record the kinds of relevant information described in sections 3051 and 4801, remand to the trial court was appropriate "for a determination of whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*People v. Franklin, supra,* 63 Cal.4th at p. 284.)

In our case, both parties agree that a record containing the kinds of relevant information described in sections 3051 and 4801 is lacking with respect to Walker. Accordingly, applying the wisdom and holding of *People v. Franklin, supra,* 63 Cal.4th 261, we likewise conclude a limited remand is necessary in this case to permit Walker to make a record of relevant information for any future youth offender parole hearing.

IX. Application of Recent Legislative Amendments to Defendants' Convictions and Sentences.

Lastly, defendants ask this court to remand their cases in light of amended section 1385, which became effective on January 1, 2019, to enable the trial court to exercise its new discretion to strike or dismiss their section 667, subdivision (a)(1)

sentencing enhancements for having prior serious felony convictions. (§ 1385, as amended by Stats. 2018, ch. 1013, § 2, No. 9 West's Cal. Legis. Service, p. 6676.) Additionally, defendants seek reversal of their convictions and remand for resentencing based on the passage of section 1170.95, which changes the law governing the application of the natural and probable consequences theory of criminal liability and the felony-murder rule. (§ 1170.95, subd. (a)(3), added by Stats. 2018, ch. 1015, § 4, No. 9 West's Cal. Legis. Service, pp. 6679–6681.)

For reasons that follow, we grant defendants' requests to remand for resentencing based on newly amended section 1385 but deny their requests for reversal of their convictions and to remand for rehearing based on newly enacted section 1170.95.

A. Section 1385 (Senate Bill No. 1393).

Effective January 1, 2019, section 1385 was amended to allow the trial court to exercise its discretion to strike or dismiss a section 667, subdivision (a)(1) sentencing enhancement for a prior serious felony conviction at the time of a defendant's sentencing or resentencing. In this case, we have already held the trial court erred in accepting defendants' prior serious felony admissions because the record reflects their admissions were not knowingly and voluntarily given, as the law requires. As a result, we have vacated defendants' sentencing enhancements under section 667, subdivision (a)(1). (*Ante*, pp. 51–52.)

In supplemental briefing, defendants now rely on the newly amended version of section 1385 to seek remand so the trial court can exercise its discretion to *strike or dismiss* their enhancements. The prosecution agrees with defendants that the Legislature intended for the amended version of section 1385 to apply retroactively to a case, like this one, where a defendant has been convicted but the judgment is not yet final pending appeal.

We agree: " '[W]hen a statute mitigating punishment becomes effective after the commission of the prohibited act but before final judgment the lesser punishment provided by the new law should be imposed in the absence of an express statement to the contrary by the Legislature.' [Citation.] As the Supreme Court stated in [*In re*] *Estrada*

[(1965) 63 Cal.2d 740], 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply.' (*In re Estrada*, *supra*, 63 Cal.2d at p. 745.)" (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090 (*Woods*).)

In *Woods*, the court addressed a comparable amendment to section 12022.53, which gave the trial court discretion to strike or dismiss sentencing enhancements for firearm use. (19 Cal.App.5th at p. 1090.) *Woods* held that "the amendment to subdivision (h) of Penal Code section 12022.53, which [took] effect before the judgment in this case [was] final, necessarily reflects a legislative determination that the previous bar on striking firearm enhancements was too severe, and that trial courts should instead have the power to strike those enhancements in the interest of justice. Moreover, because there is nothing in the amendment to suggest any legislative intent that the amendment would apply prospectively only, we must presume that the Legislature intended the amendment to apply to every case to which it constitutionally could apply, which includes this case." (*Id.* at p. 1091.) We accept the parties' contention that this reasoning applies here, given that we are faced with essentially the same issue—retroactivity of a new statute lessening punishment.

We thus conclude the trial court on remand should have the opportunity to exercise its new discretion to decide whether to strike or dismiss the prior serious felony enhancements imposed in defendants' cases.

B. Section 1170.95 (Senate Bill No. 1437).

We next address defendants' argument that recent changes to California law governing the application of the natural and probable consequences theory of liability and the felony-murder rule that came into effect following the Legislature's adoption of Senate Bill No. 1437 require this court to apply the new laws and reverse their murder convictions.

During the pendency of defendants' appeals, the Legislature amended sections 188 and 189, effective January 1, 2019, which define malice and the degrees of murder. As amended, these statutes now address, and restrict, liability for felony murder. (§§ 188, 189.) The Legislature also added section 1170.95, which establishes a procedure for eligible individuals[22]—like defendants—who have been convicted of felony murder or murder based on the natural and probable consequences theory to petition the court to consider the evidence in the record, as well as new and additional evidence, to determine whether the petitioner is entitled to retroactive sentencing relief under Senate Bill No. 1437.[23] (§ 1170.95, subd. (a).)

The parties agree Senate Bill No. 1437 is essentially remedial in nature in that it lessens punishment for a category of individuals and, accordingly, should apply

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[22] Under subdivision (a) of section 1170.95, an individual convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the sentencing court to have his or her murder conviction vacated and to be resentenced on any remaining counts if all of the following conditions are met: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019."

[23] Under subdivision (d) of section 1170.95, once a petition has been filed pursuant to this statute and an order to show cause has been issued, the trial court must, within 60 days after issuance of this order, hold a hearing "to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not been previously been [*sic*] sentenced, provided that the new sentence, if any, is not greater than the initial sentence." At this hearing, the prosecution has the burden to prove beyond a reasonable doubt that the petitioner is ineligible for resentencing. Both the prosecution and the petitioner may rely on the record of conviction, as well as new or additional evidence, to meet their respective burdens of proof. At the conclusion of the hearing, if the prosecution has not met its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, must be vacated and the petitioner resentenced on the remaining charges. (§ 1170.95, subd. (d)(3).)

retroactively to all eligible persons regardless of the date of their convictions. We agree. (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1147–1148 (*Anthony*) [Senate Bill No. 1437 applied retroactively where defendants were convicted of murder based on the natural and probable consequences doctrine, following *In re Estrada*, *supra*, 63 Cal.2d 740].) As we have already discussed at length, it is well established that an amendatory statute like section 1170.95 that lessens punishment is presumed to apply in all cases not yet reduced to final judgment as of the statute's effective date, unless the enacting body "clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent." (*People v. Nasalga* (1996) 12 Cal.4th 784, 793; see *In re Estrada*, at p. 747.)

The parties disagree, however, whether eligible individuals, like defendants, may pursue reversal of their convictions under Senate Bill No. 1437 by direct appeal, or whether they must await resolution of their appeal and then proceed in the trial court by way of the procedure established in section 1170.95. Two appellate courts, including our colleagues in Division Two of this District, have held based on the statutory language of section 1170.95 that our Legislature intended that relief must be sought by filing a petition in the trial court rather than on direct appeal. (See *Anthony*, *supra*, 32 Cal.App.5th at pp. 1152–1153; *People v. Martinez* (2019) 31 Cal.App.5th 719, 729 (*Martinez*).)

Both *Anthony* and *Martinez* used the same reasoning in concluding the Legislature intended section 1170.95's petitioning procedure to be the exclusive remedy for persons like defendants who seek sentencing relief based on Senate Bill No. 1437. Moreover, both courts relied on two California Supreme Court cases addressing the retroactive application of legislative enactments that, like Senate Bill No. 1437, establish petitioning procedures for individuals seeking relief under new laws. These cases are *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*) (Proposition 36) and *People v. DeHoyos* (2018) 4 Cal.5th 594 (*DeHoyos*) (Proposition 47). (See *Anthony*, *supra*, 32 Cal.App.5th at pp. 1149–1152; *Martinez*, *supra*, 31 Cal.App.5th at pp. 724–728.)

Based on our Supreme Court's guidance, *Martinez* relied on the following reasoning, which *Anthony* then adopted: "The analytical framework animating the decisions in *Conley* and *DeHoyos* is equally applicable here. Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal."[24] (*Martinez*, *supra*, 31 Cal.App.5th at p. 727; *Anthony*, *supra*, 32 Cal.App.5th at p. 1152.)

We agree with our colleagues' analyses and conclusions. In doing so, we reject defendants' arguments for *not* following *Martinez*. First, defendants attempt to distinguish *Conley* and *DeHoyos* by arguing that, in those cases, sentencing relief was not automatic because to receive relief, the trial court had to first assess the convicted defendant's risk to public safety. (See *Conley*, *supra*, 63 Cal.4th at pp. 658–659 [to be entitled to sentencing relief under Proposition 36, the trial court must first determine the petitioner is not an unreasonable risk to public safety].) Here, defendants argue that relief from their murder convictions and sentences should be automatic and given by this court

[24] *Martinez* also pointed out, "Providing the parties with the opportunity to go beyond the original record in the petition process, a step unavailable on direct appeal, is strong evidence the Legislature intended for persons seeking the ameliorative benefits of Senate Bill 1437 to proceed via the petitioning procedure. The provision permitting submission of additional evidence also means Senate Bill 1437 does not categorically provide a lesser punishment must apply in all cases, and it also means defendants convicted under the old law are not necessarily entitled to new trials." (31 Cal.App.5th at p. 727; accord, *Anthony*, *supra*, 32 Cal.App.5th at pp. 1152–1153.)

once the new laws are applied. We disagree that defendants are automatically entitled to relief. On the contrary, section 1170.95 expressly gives the People (and defendants) the right to present new and additional evidence to the trial court while considering their petitions. (§ 1170.95, subd. (d).) Only after considering this evidence and hearing from the parties will the trial court determine defendants' eligibility for relief. (*Ibid*.) Were we to adopt defendants' approach, we would be denying the People this right. Unlike a trial court, we are bound by the record on appeal. (See *Anthony*, *supra*, 32 Cal.App.5th at pp. 1153–1154.)

We also reject Frazier's argument that this court should determine their right to relief under Senate Bill No. 1437 for reasons of judicial economy. Given the clear legislative intent under Senate Bill No. 1437 to provide a new petitioning process with the right to present new and additional evidence under the amended versions of sections 188 and 189, the impacts, *if any*, on judicial efficiency do not guide our decisionmaking with respect to whether defendants are entitled to such relief. (*People v. Flores* (2003) 30 Cal.4th 1059, 1063 ["When the language of a statute is clear, we need go no further"].)

Lastly, defendants complain that unless we vacate their murder convictions, their due process rights will be violated because the jury was not instructed on the new legal restrictions on criminal liability for murder. Again, defendants' argument disregards the new petitioning procedure under section 1170.95. As *Anthony* explained, in passing Senate Bill No. 1437, "the Legislature prescribed a specific avenue for convicted defendants to seek retroactive relief, the petition procedure outlined in section 1170.95." (*Anthony*, *supra*, 32 Cal.App.5th at p. 1154.) Thus, defendants' due process rights will be respected even though we do not apply the new legal standards to their cases in the first instance.

Thus, in conformity with *Anthony* and *Martinez*, we deny defendants' requests to apply the amended versions of sections 188 and 189, reverse their murder convictions, and remand their cases for resentencing on any and all remaining counts in light of Senate Bill No. 1437. We take no position on whether defendants may qualify for resentencing relief under the new law. Rather, once their appeals become final,

defendants will be entitled to pursue relief in the trial court using the procedures established under section 1170.95. For the purposes of this appeal, we have applied the law that existed at the time of trial with respect to felony murder and the natural and probable consequences doctrine to the extent these doctrines are implicated.[25]

DISPOSITION

The judgment is vacated as to each defendant with respect to count II (carjacking) and count III (conspiracy to commit a carjacking). In addition, the matters are remanded for a retrial on the allegations relating to defendants' prior felony convictions and, as to Walker, on the development of a record of relevant information for any future youth offender parole hearing. In all other regards, the judgment is affirmed as to each.

[25] Walker's May 21, 2019 motion to sever his appeal from Frazier's appeal is denied as moot.

_____
Wiseman, J.*

We concur:

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Siggins, P. J.

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Petrou, J.

A137905/*People v. Walker & People v. Frazier*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.